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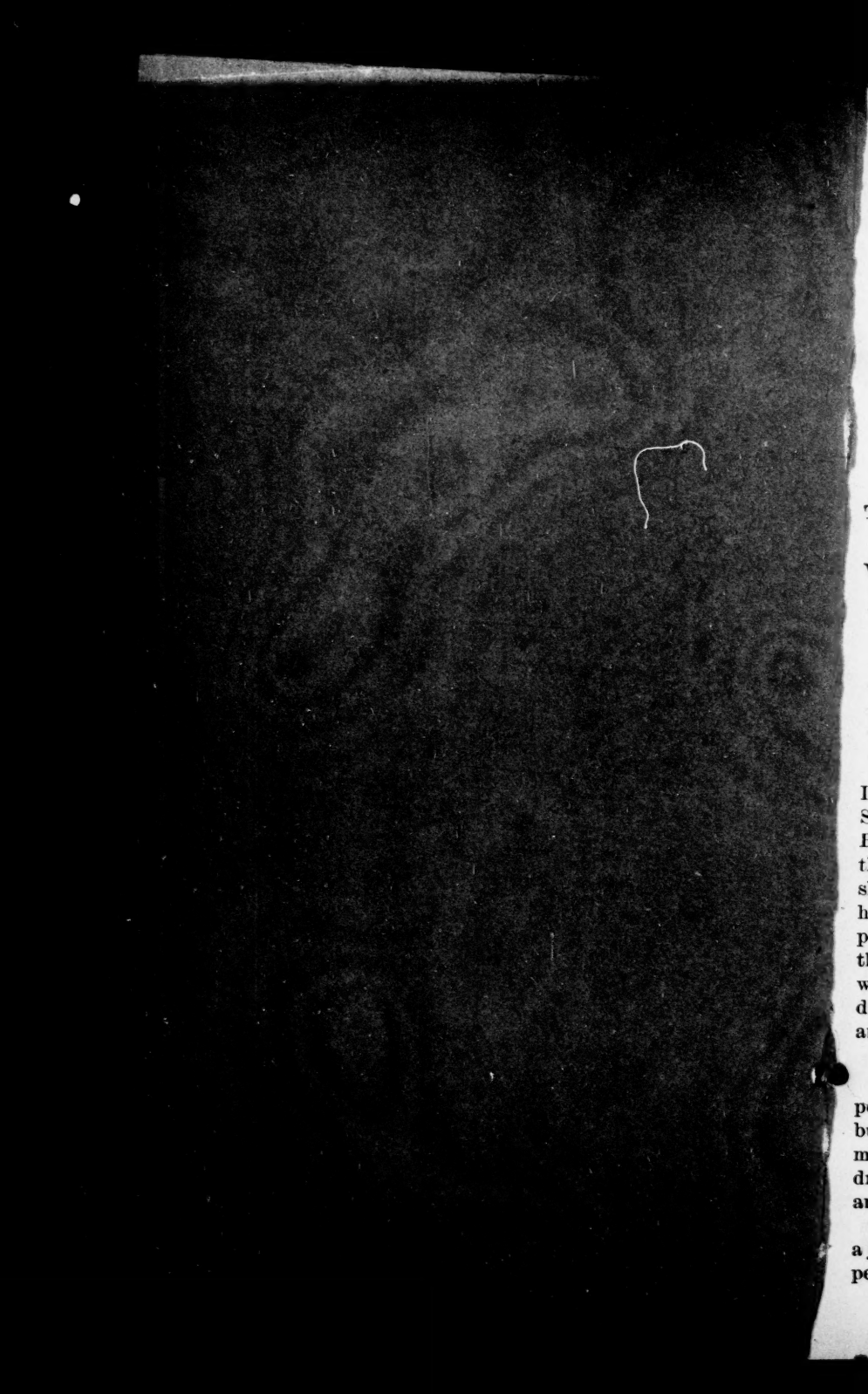
In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, EX REL. CHARLES D. LONG, plaintiff in error, v. WILLIAM LOCHREN, COMMISSIONER OF PENSIONS. } No. 724.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.



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BRIEF FOR DEFENDANT IN ERROR.

This proceeding was originally instituted by the relator, Charles D. Long, against defendant in error and also against Hon. Hoke Smith, Secretary of the Interior. Both respondents joined issue. Mr. Justice Bradley, of the Supreme Court of the District of Columbia, before whom the proceeding was heard in the first instance, held that no cause was shown against the petition by the Commissioner, and decided against him with costs. He decided that good cause was shown against the petition by the Secretary, and decided in his favor without costs. What the theory of the learned justice as to costs in *mandamus* proceedings was, we have been unable to ascertain, but it is no longer necessary to discuss. On appeal by the Commissioner the judgment was reversed and the petition dismissed. Relator then sued out this writ of error.

Very briefly stated, the case is this:

Charles D. Long, the relator, is a wounded veteran who has been a pensioner at various rates since 1863. He has good general health, but only one arm, and an open wound which prevents him from active muscular exertion and requires to be dressed twice a day. He can not dress it properly himself, and therefore needs the semi-daily aid of another person.

He was a lawyer by profession until January, 1888, when he became a judge of the supreme court of the State of Michigan, in the active performance of judicial duties and receiving a handsome salary.

In 1884, overruling all the medical authorities in the Pension Bureau, Commissioner Dudley raised his pension to $50 a month for total helplessness under the statute of June 18, 1874, ch. 298, which enacts as follows:

> That section four of the act entitled "An act to revise, consolidate, and amend the laws relating to pensions," and approved March third, eighteen hundred and seventy-three, be so amended that all persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month; and this shall be in lieu of a pension of thirty-one dollars and twenty-five cents per month granted to such person by said section: *Provided*, That the increase of pension shall not be granted by reason of any of the injuries herein specified unless the same shall have resulted in permanent total helplessness requiring the regular personal aid and attendance of another person.

While allowing the relator more than the medical authorities considered right, the Commissioner denied his claim in two respects: first, he granted no arrearages for the period prior to March 21, 1884, when the medical examination was made; second, he refused to make the rate $72 a month under the statute of June 16, 1880, ch. 236, § 1, which enacts as follows:

> That all soldiers and sailors who are now receiving a pension of fifty dollars per month, under the provisions of [the act aforesaid] shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

On May 6, 1889, relator made an informal oral application to Commissioner Tanner for a rehearing on both these points. The Commissioner granted it *instanter*, giving him both the higher rate of pension and some arrearages. Later in the same year, relator finding that he had forgotten to claim arrearages for a period many years previous, the Commissioner reopened the case again for that purpose on August 16, 1889.

Meanwhile the Commissioner's proceedings in this and many other cases were being investigated, and the investigation resulted in his prompt resignation. This relator's rerating was regarded by the officials of the Department at that time as illegal (H. R. Ex. Doc., Fifty-first Congress, first session, No. 360, p. 93); but no action was taken thereon until the present Administration, when Commissioner Lochren revoked the Tanner certificate and issued a certificate for $50 a month under the act of July 14, 1892, ch. 169, which enacts as follows:

> That soldiers and sailors who are shown to be totally incapacitated for performing manual labor by reason of injuries received or disease contracted in the service of the United States, and in line of duty, and who are thereby disabled to such a degree as to require frequent and periodical, though not regular and constant, personal aid and attendance of another person, shall be entitled to receive a pension of fifty dollars per month from and after the date of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability, and made subsequent to the passage of this act.

This is an application for a *mandamus* to compel the Commissioner to reverse his action and restore the Tanner rating.

FORM OF THE RECORD.

In the record appears a "replication" (pp. 39–43) which, however, is immaterial to the decision of the cause. This requires some explanation.

There being no statutes in this District affecting proceedings in *mandamus*, they are governed by the common law procedure; that procedure having been inherited by the State of Maryland, and having remained unchanged in that State up to the time when the District of Columbia was set off. If any statute regarding these proceedings is in force in the District it is the well-known statute of Anne. (9 Anne, ch. 20; Tapping on Mandamus, p. 439.) It has always been a matter of doubt whether that statute was applicable to any of the courts on this continent. The decisions are in conflict. It is not necessary to discuss the question here, because the statute does not apply to proceedings against public officers. In such proceedings the petitioner is bound by the return. (Tapping on Mandamus, p. 383; *Brosius* v. *Reuter*, 1 H. & J., 551, 557; *Harwood* v. *Marshall*, 10 Md., 451, 463, 464; *Lunt* v. *Davison*, 104 Mass., 498.)

There can, therefore, be no such pleading as a "replication" in proceedings not coming within the statute of Anne. In fact, even in proceedings under that statute a "replication" is a pleading not by the relator, but by the respondent. (Tapping on Mandamus, pp. 7, 387.) Nor can there be any pleading whatever by the respondent until after the alternative writ issues. It has been customary in this District (where, indeed, the practice has been very vague) to present, in response to the rule to show cause, a paper entitled "answer" or "return." This is a convenient nomenclature, and has been adopted by the undersigned. The "answer" is, however, nothing but an affidavit, and the proceeding comes up as on a motion without pleadings until the alternative writ issues.

A course was taken here which is both usual and convenient. A stipulation was entered into by which the rule to show cause became an alternative writ, and the affidavits or "answers" filed thereto became

returns (p. 43). A regular motion was then made to quash the returns according to the common-law practice. (Tapping on Mandamus, p. 7.)

The questions thus came before the court in the same way as when a cause in equity is set down to be heard upon the bill and answer. The court is to consider the petition so far as its allegations are admitted, and to take as true the allegations of the answer. It is to consider only, however, allegations of fact, neither party being bound by the other's conclusions of law.

STATEMENT OF FACTS.

This petitioner has received a considerable number of different pensions at different times under successive statutes. For convenience of reference, therefore, we set forth the statutes in chronological order in connection with the facts of the case, quoting to some extent from an opinion of Mr. Justice Cox, of the supreme court of the District of Columbia, in an injunction suit between these parties, a copy of which opinion is hereto annexed.

1. *Injuries.*—The Commissioner of Pensions claims (p. 12), and we shall argue, that there is no competent evidence in the case as to the present results of relator's injuries; that the court can not consider any evidence which the Commissioner of Pensions could not have considered, and that there is not sufficient evidence in any case for the Commissioner to act upon until the pensioner or applicant has submitted to a medical examination.

Assuming, however, that the court may consider the matter independently, upon allegations in the nature of pleadings, the facts would appear as follows:

Relator was a private in Company A, Eighth Michigan Regiment, and received two gunshot wounds at the battle of Wilmington Island, Georgia, April 16, 1862. One of these caused the amputation of his arm just below the shoulder. The other struck him in the left hip, passed through the hip bones and across into his right groin, where it still is. This hip wound has remained a running and open wound to this day, and can now be probed to the depth of 6 or 7 inches. It discharges at times copiously and has to be dressed at least twice a day. From its position in the left hip he can not readily reach it with his right hand; it is therefore necessary for him to have the semi-daily aid and attendance of another person to dress it. He can dress it himself with considerable difficulty, but it is not properly done, and he does not do it except when he is away from home and can not readily have the assistance of another person (pp. 1, 2). He is entirely able to perform such manual labor as may be performed by a person having only one arm, except only labor involving such muscular action as may cause a strain to the wound in his hip (p. 12).

Upon these facts it is conceded by the Commissioner of Pensions that relator is totally incapacitated for performing manual labor within

the meaning of those words in the act of July 14, 1892, ch. 169, as construed by the Pension Office (p. 12). Relator insists that "as far as the performance of manual labor is concerned, his wounds and injuries from the day they were received resulted in permanent total helplessness," etc. (p. 2). This statement is regarded as totally immaterial. The last medical examination of this relator was on March 21, 1884. The report of the examining surgeons, so far as it states the results of their actual observation, is as follows (p. 33):

> His pulse rate per minute is normal, his respiration normal, and his temperature normal. The examination reveals the following conditions: Lost the left arm at the junction of the upper and middle third; wears an artificial arm; stump of the arm good and not tender. * * * He had a g. s. w. of the left hip, the ball entering two inches directly behind the anterior spinous process of the ilium, and he says that it is lodged in the rt. groin and claimed that he could feel it. An examination by us demonstrates that he only felt the pelvis bone. The location of the ball can not be found, and whether it is lodged at all depends wholly on his own statement. The alleged seat of entrance of ball is yet open and discharging. The ilium is diseased. * * * He is a straightforward man, and he has been badly injured. * * * He is well nourished, skin clear, smooth, and elastic; assimilation, good.

2. *Ratings prior to 1884.*—Relator was honorably discharged from service June 23, 1862. Immediately thereafter, by the "act to grant pensions" of July 14, 1862, ch. 166, Congress provided that every soldier "disabled by reason of any wound received or disease contracted by him in the service of the United States and in the line of duty" should "be entitled to receive for the highest rate of disability" certain fixed rates of pension graded according to rank, "and for an inferior disability an amount proportionate to the highest disability, to commence as hereinafter provided, and to continue during the existence of such disability. The pension for a total disability * * * shall be as follows, viz: * * * privates, $8 per month." Loss of an arm was then one of the injuries classed as "total" when not specified in the statute.

On July 16, 1862, two days after the passage of the statute, relator made affidavit showing the loss of his left arm and the other wound still unhealed and the ball not extracted, accompanying the affidavit with a physician's certificate (pp. 19–20). Upon this showing he received, February 28, 1863, a pension of $8 a month, to date from his discharge from the service (p. 15).

The act of June 6, 1866, ch. 106, established the following rates of pension (quoting Mr. Justice Cox's classification of the provisions of this statute):

> 1. (*a*) For those who had lost *both eyes* or *both hands*, and (*b*) those *otherwise so permanently and totally disabled as to render them utterly helpless*, or (*c*) so nearly so as to require the constant

personal aid and attendance of another person, *twenty-five dollars* ($25) per month.

2. (*a*) For those who had lost *both feet*, or (*b*) *one hand and one foot*, or (*c*) otherwise *so disabled as to be incapacitated from performing manual labor, but not so much so as to require constant personal* aid and attendance, twenty ($20) per month.

3. For those who had suffered the loss of *one hand or one foot*, or had been permanently disabled in the same, *fifteen* dollars ($15) per month.

Relator thereupon applied for the $15 rating (p. 21) and received it (p. 15).

The act of June 8, 1872, ch. 342, raised these ratings to $31.25, $24, and $18, respectively.

Relator made an informal application for the $18 rating (p. 22) and received it (p. 15).

The next following acts and the relator's proceedings thereunder are stated by Mr. Justice Cox as follows:

> An act of March 3, 1873, ch. 234, increased the rates given by the foregoing act. For total helplessness, or *the condition* so near it as to require personal aid and attendance, it gave $25 per month from June 4, 1864, to June 3, 1872, and thenceforward $31.25; and for incapacity to perform manual labor, not requiring personal aid and attendance, it gave $20 from June 4, 1864, to June 3, 1872, and thereafter $24 per month. Yet, although the complainant was only receiving $18 per month, he made no application for increase under this act.
>
> The act of June 18, 1874, ch. 299, allowed all persons who were then entitled to pensions under existing laws, and who had lost either *an arm* at *or above the elbow* or a leg at or above the knee, *to be rated in the second class*, and receive *twenty-four dollars* per month. On the 29th of August, 1874, the complainant applied for an increase of his pension, under this law, to $24 per month, which was allowed (pp. 22, 15).
>
> The act of June 18, 1874, ch. 298, increased the allowance for permanent total helplessness requiring the personal aid and attendance of another person to $50 per month. The complainant made no application for increase under this law.
>
> The act of June 16, 1880, ch. 236, increased the allowance of those who were receiving pensions under the last act to $72 per month.
>
> On the 15th of August, 1881, the complainant applied for an increase of pension. He says "*he is a pensioner by reason of loss of arm above the elbow;* that he believed himself entitled to an increase of pension on account of gunshot wound of left hip. * * * Said wound has never healed, and requires bandaging and dressing every day, and has been, every day since it was received, discharging frequently to such an extent as to stain through dressing and bandage and clothing, and causing shrinkage of hip, and at times much lameness and soreness of hip" (p. 23).
>
> This was the first time that he had made any separate claim for this particular injury. He did not state under what act he claimed, or that the injury incapacitated him from manual labor

or rendered him helpless to a degree requiring the aid and attendance of a third person. And as it came within no specific provision of the statutes for increasing his pension beyond $24 per month, which he was then receiving, the Commissioner could do nothing else than reject the claim (p. 16). One of the two affidavits filed by him did, indeed, state that in the opinion of the affiant, a physician, he was incapable of performing manual labor (p. 25). But that alone, under the latest act then in force relating to that disability—that of March 3, 1873—would not entitle him to more than $20 per month.

The act of March 3, 1883, chapter 91, gave to all persons then on the pension rolls who shall have *lost an arm at or above the elbow*, or a leg at or above the knee, or who shall have been otherwise so disabled as to *be incapacitated to perform manual labor*, but not so much so as to require regular aid and attendance, $30 per month.

On March 21, 1883, the complainant applied for a new certificate *under the new act*, under which he said he was advised he was entitled to $30 per month (p. 25).

As he made no new declaration, it is to be taken for granted that the increase was asked for the loss of arm, for which he had already been advanced several times, and of which, therefore, no new proof was necessary.

On the 13th of March, 1884, which was sixteen years after the first act of Congress (June 6, 1866) providing for the condition *of helplessness requiring aid and attendance*, and that of *incapacity to perform manual labor*, the complainant, for the first time, applied for an increase on the ground that he *required aid in taking care of his hip wound.*

3. *Proceedings of 1884.*—The application of March 13, 1884, just referred to, was made by personal letter to one Phil W. Coleman (pp. 25–6). Mr. Coleman was a member of the board of review in the Pension Office. Relator in his application admits that he had previously overlooked his claim based upon receipt of aid in dressing his hip wound. He says:

> I can now clearly show what I understand will make my case a clear one, entitling me to an additional $20 per month [under act of June 18, 1874, ch. 298], or possibly additional $42 per month [act of June 16, 1880, ch. 236]. My proofs already in do not disclose the fact that I require aid in taking care of my hip wound. I have suffered with it since April 16, 1862, and from that time forward have had to have help in dressing it (which is and has been necessary for all these years). I had, however, understood until quite lately that the showing must be made that I could not get around without assistance. Of course I could not make such proof as that, and rather than misstate any fact I would put in no additional proofs whatever. As I now understand the act, if I can show that I need assistance in dressing the wound and taking care of that, then my claim will be made out. This I can show conclusively. * * * Senator Palmer will do all possible to call my case up specially if I come.

This letter was indorsed over to Hon. W. W. Dudley, then Commissioner of Pensions (p. 26), and afterwards a number of affidavits were

filed tending to show that relator needed assistance twice a day for the purpose of bandaging his wound, and was considerably disabled thereby otherwise (pp. 27–32).

It was at this time that the wound was examined by the surgeons in the Pension Office, and the statements of fact contained in their certificate have already been quoted. They rated his loss of arm at "second grade" ($30), the hip wound standing alone as a "total" ($8), and therefore the whole at "a [$30] second-grade rating for all disabilities" (p. 33). The medical referee reported to the Commissioner as follows (p. 33):

> Mr. COMMISSIONER. It seems very doubtful to me whether the case comes within the intent of act of June 18, 1874, which applies to a "permanent and total helplessness, requiring the regular personal aid and assistance of another person.

Commissioner Dudley thereupon, on the same day, wrote the following order on a slip of paper (p. 34):

> Reissue to allow first grade from earliest date consistent with the proof.

The medical referee then appended to the slip the following memorandum (p. 34):

> Approved for 1st grade ($50) from March 21, 1884. (See the Commissioner's slip, hereto appended, of March 21, 1884.)

The latter approval was given August 2, and on August 13 the legal reviewer also approved, but also based his approval upon the Commissioner's "slip" (p. 34).

On August 16, 1884, accordingly, a new pension certificate was issued for $50 a month, reciting that it was "issued in lieu of certificate dated April 5, 1883, to change disability and allow increase." The Commissioner decided the disability not to be a "permanent specific disability" within the meaning of Rev. Stat., § 4698½ (p. 16).

Relator wrote a letter to Commissioner Dudley protesting against the fact that his $50 rating was only allowed to commence from March 21, 1884, saying:

> I desire to make my protest, to save any rights I may have for rehearing of my claim, upon this ground: 1st. That I am entitled to draw at this rate from the date of the act of 1874. 2nd. That I am at least entitled to draw at this rate from Aug., 1881, the date of my application for increase, as I was not in fault in not having my medical examination till March 21, 1884. If I conclude to make application to reopen my case I shall insist upon these points. (p. 34).

Relator made no further application, however, for nearly five years (p. 17). Mr. Justice Bradley regards this letter as preserving relator's rights, a question which we shall discuss hereafter..

4. *Proceedings of 1889.*—On May 6, 1889, relator made a new application (this time an oral one) to Hon. James Tanner, Commissioner of Pensions. No further papers were filed and no new evidence given. The sole ground for a rehearing was an alleged error in Commissioner

Dudley's decision. The case was expedited by order of Commissioner Tanner, who reheard it on the same day upon the evidence which had been before Commissioner Dudley (p. 17). He filed a short opinion, which appears at pages 34–5, which expressly states that the ground for a reconsideration was "error in the adjudication of his case." It also contains the erroneous statement "that the additional disability for which he was increased to $50 was not only claimed for in his original declaration, but at the date of the passage of the act of June 16, 1880, although not adjudicated, it is shown by the action of the office to have entitled him to the $50 per month at that date."

The legal reviewer of the Pension Office indorsed his approval, "By order of the honorable Commissioner of Pensions" (p. 35). The pension was increased to $72 a month, and relator was given arrearages at $50 a month from June 4, 1874, to June 17, 1878, and $72 a month from June 17, 1878, to May 6, 1889 (p. 17). His new certificate, issued on the same date, May 6, 1889, contained at the end the misleading recital that it was "issued in lieu of certificate dated August 16, 1884, to change date of commencement of increase," although the main change was an incerase in rate.

Relator was still unsatisfied, and procured another rehearing at the Pension Office, the result of which was the issuance of another new certificate on August 16, 1889, giving him arrearages at the rate of $25 per month from June 6, 1866, to June 4, 1872, and $31.25 per month from June 4, 1872, to June 4, 1874, which arrearages he then collected from the Government (p. 17).

5. *Proceedings of 1893–94.*—On or about July 23, 1893, the Commissioner of Pensions examined the affidavits, medical reports, and other evidence on file in the relator's case, and upon these, in connection with relator's ability to fill an active judicial office, arrived at the conclusion that there was sufficient ground for reviewing Commissioner Tanner's proceedings. He accordingly suspended payment of the pension, according to the then long-settled course of practice in the Bureau. The reasons for his action were: First, that Tanner's proceedings were without jurisdiction and a nullity; second, that relator's judicial office now appearing, his condition appeared not to be one of permanent, total helplessness as called for by the statute (pp. 12–13). The suspension was terminated by the Urgent Deficiency Act of December 21, 1893, ch. 3. Proceedings subsequently instituted under that act terminated May 1, 1894, in the order now complained of.

IMPORTANCE OF THE CONTROVERSY.

This case, in one aspect, involves the question whether it is within the power and duty of the Commissioner of Pensions to stop further payments of a pension which he finds to be manifestly illegal, and to have been granted by a preceding Commissioner altogether without any jurisdiction to do so.

The power to revoke or reduce pensions for illegality has been exercised by the Pension Office from time immemorial, and seems to have been first questioned (except indirectly in the Harrison case, *infra*) about the time when the present litigation arose. It is now claimed, however, that when a pension certificate is issued, the act of the Commissioner is equivalent not merely to the judgment of a court, but to the judgment of a court of general jurisdiction. This claim is made with apparent confidence, although the issuance of a pension ordinarily involves no conscious action of the Commissioner, nor even his manual signature. Since this branch of the Government work became so enormous, the actual rulings have been made by mere clerks in the various divisions, while the name of the Commissioner has been affixed to the certificate by means of a rubber stamp. The Commissioner has personally neither considered the case nor signed the "judgment" except when the matter was brought to his attention on account of the large amount involved or some other special reason.

Cases precisely like the present are rare. Few veterans have been placed upon the rolls for "total helplessness," and it is presumable that most of these are really helpless. The brief filed by appellant, however, indicates that this is regarded as an important test case. The reductions and revocations of pensions which have been made by Commissioner Lochren are alluded to in such a way as to make it clear that it is intended here and now to settle the question whether he has the right and duty to consider the jurisdictional questions raised by the unlawful acts of Commissioner Raum in administering the famous pension act of June 27, 1890, chapter 634. It is plain that proceedings under this act are referred to, since Commissioner Lochren's reductions of pensions under prior laws have varied little in number from those made by his predecessors in office. (See VII, *b*, *infra*.)

Under these circumstances it is deemed proper to acquaint the court with the provisions of the pension act of 1890, and with the history of that act and of its subsequent administration. While bringing clearly before the court the nature of the controversy which it is asked indirectly to settle, this may also serve the purpose of illustrating the nature of the jurisdictional questions which are from time to time presented to a Commissioner of Pensions.

The act of 1890 (sometimes, although very incorrectly, called the Dependent Pension Act) originated in a bill reported to the Senate in that year by Mr. Davis, of Minnesota. The bill was intended to provide pensions for veterans of the civil war who were so disabled as to be unable to support themselves, although the disabilities could not be proved to be, or were not, the result of their service in the war. As originally introduced the pensionable disability was required to be one "which totally incapacitates them from the performance of manual labor." On recommendation of the Committee on Pensions, the bill was amended by striking out the words "totally" and "manual" and

adding certain words, so as to make the disability one "which incapacitates them from the performance of labor in such a degree as to render them unable to earn a support." The bill as it passed the Senate also contained a "dependent" clause restricting the operation of the act to persons who were dependent upon their daily labor, or upon the contributions of others not legally bound thereto, for their support. (Sen. R. No. 90, of Jan. 15, 1890; id., No. 989, of May 13, 1890; Cong. Rec., Feb. 28, 1890, pp. 1796 *et seq.;* March 31, 1890, p. 2846.)

The House of Representatives having substituted a bill of its own with a series of provisions of a totally different nature, the act in its present form was drafted, after long consideration, by a conference committee of the two Houses. It was based on the Senate bill, but with three noticeable changes: First, the word "manual" was reinserted before the word "labor;" second, the "dependent" clause was stricken out, so as to make capacity for manual labor the test, irrespective of the pecuniary circumstances of the applicant; and third, provision was made for persons who could earn something, but not enough to be fully self-supporting, by authorizing the Commissioner to grade the pensions at from $6 to $12 per month, "proportioned to the degree of inability to earn a support."

Omitting the provisions of the act relating to widows and dependent parents, etc., and some other provisions not material for present consideration, the act as finally passed established the following class of invalid pensioners:

> § 2. That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom, and who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, *which incapacitates them from the performance of manual labor in such a degree as to render them unable to earn a support*, shall, upon making due proof of the fact according to such rules and regulations as the Secretary of the Interior may provide, be placed upon the list of invalid pensioners of the United States, and be entitled to receive a pension not exceeding twelve dollars per month and not less than six dollars per month, proportioned to the degree of inability to earn a support.

In the House of Representatives the bill was in charge of Mr. Morrill, of Kansas, who is described in the debate by Judge McComas as "the wisest, truest, noblest, and best friend the soldier has had in Congress on either side in eight years." Mr. Morrill stated that capacity for manual labor was deliberately made the test. Being questioned by Mr. Struble, of Iowa, as to the legal effect of the act, he explained it as follows:

> Mr. STRUBLE. If utterly unable to earn a living the person will receive $12 a month?

> Mr. MORRILL. Yes, sir; and if half unable, $6 a month. In order to receive $12 the party must be utterly unable to earn his support.

Mr. Morrill stated that he had made the estimates of the expense of the act "as full as possible, so as not to make a mistake on the wrong side." He estimated that about 200,000 soldiers and 100,000 widows would be added to the roll, and that a considerable number would have their pensions increased, (in other words, that a number of persons theretofore pensioned under existing laws for service disability might be transferred and receive a higher rating under the new act).

Mr. Morrill stated that the act would not cause an expense of over $35,000,000 per annum. Mr. Cannon, of Illinois, stated that the bill would place 250,000 new names on the pension roll and increase the pensions of 50,000 pensioners. He also stated the expense of the new law at $35,000,000 per annum. (Cong. Rec., June 11, 1890, pp. 5945–5949.)

Mr. Davis had charge of the conference bill in the Senate. It was closely criticised by some Senators on the ground of extravagance. Mr. Davis stated that the cost of the act could not largely exceed $40,254,000; that all experts considered this estimate too high, and that Commissioner Raum pronounced it to be more than ample. He estimated that, including the pensioners transferred from the old laws, it would provide for 300,000 persons in all. (Cong. Rec., June 23, 1890, p. 6378.)

In explaining the act to the Senate Mr. Davis said (p. 6378):

> Three or four conditions precedent are prescribed by this measure to entitle an applicant to be placed upon the pension rolls. He must be suffering from a mental or physical disability. It must not be of an acute character, but it must be of a permanent character. It must not be the result of his own vicious habits. It must incapacitate him from the performance of manual labor in such a degree as to render him unable to earn a support.

Answering some criticisms, he estimated the number of persons who might become applicants under § 2 (that is, veterans not provided for by existing laws) at 634,000, and proceeded as follows (p. 6378):

> Does any man suppose, and can any man who will seriously discuss this question for a moment maintain, that of 634,000 men of that character 90 per cent or 75 per cent are suffering from a mental or physical disability of a permanent character which incapacitates them from the performance of manual labor in such a degree as to disable them from earning a support? The question contains within itself the answer. The experience of each of us in the communities in which we live, testing this question by the range of our acquaintance with the soldiers, shows that an estimate of that kind is simply preposterous, absurd, and, if persisted in, made with a motive which can not be to arrive at a true solution of the question.

We have thus given the act of 1890, the construction given to it in debate, and the authoritative estimates of the probable number of pensioners under it and of the total cost of their pensions.

On June 30, 1895, after the large reductions complained of, there remained on the rolls 378,115 invalid pensioners under this act, besides 100,800 widows, etc., making a total of 478,915; and the total pension payments for the fiscal year under this act were $59,102,335.29, or far greater than the Treasury deficit for the year.

There were also 130,870 applicants for invalid pensions under this act, besides the widows, etc.

Why this extraordinary increase over the estimates of Messrs. Davis and Morrill, upon which Congress acted? One reason may be found in the fact that Commissioner Raum immediately abandoned the construction which they had given to the act, which was authoritatively explained by them to Congress as its true construction, and upon the faith of which the act had passed. Under the construction adopted in the Pension Office *the inability of the applicant to perform manual labor was not taken into consideration.*

Thus in *Bennett's Case* (7 P. D., 1) and others a rating of $12 per month under this act was given on January 29, 1891, for *slight deafness of both ears.* In *Wood's Case*, unreported, a pension under this act was given for *impaired vision of the right eye.* Such instances could be indefinitely multiplied.

These ratings were made under a somewhat ambiguous order signed by Commissioner Raum in 1890 and countersigned by General Bussey, Assistant Secretary of the Interior, known as "Order No. 164." In *Weike's Case* (6 P. D., 193), decided January 7, 1893, the practice of the Bureau under this order was brought to the attention of General Bussey and condemned by him, he saying:

> The basis of rates under the act of June 27, 1890, is inability to earn support by reason of incapacity for manual labor due to a permanent mental or physical disability not the result of vicious habits.

In *Bennett's Case*, *supra*, the question was reexamined by Assistant Secretary Reynolds on May 27, 1893, and the same result reached. The construction thus concurred in by Messrs. Davis, Morrill, Bussey, and Reynolds was submitted to and approved by Attorney-General Olney. As the Raum construction appeared to be not only erroneous but absolutely illegal and the pensions thereby granted altogether void for lack of jurisdiction, a review of all the work done under "Order No. 164" became a duty of the Commissioner, if he is correctly advised as to the nature of his responsibilities.

Meanwhile, by working a large force of clerks, an enormous number of pensions had been issued. It appeared by the annual report of Commissioner Raum that 302,811 pension certificates were issued during the fiscal year 1892, of which 230,771 were under this act of 1890. The

total number of pension applications passed upon during that year was 459,611, or about 1,500 for every working day. These, of course, for the most part represented merely clerical work, the Commissioner's name being affixed by a rubber stamp, as above stated.

Commissioner Lochren organized boards of revision in pursuance of the decision in *Bennett's Case*. During the fiscal year 1895, pursuant to recommendations of this board, 4,149 pensioners were dropped from the rolls as not disabled for the performance of manual labor in any form or degree; 2,279 who had previously been pensioned under the general laws were reduced to their old ratings, and in 20,359 cases the rate of pension under the act of 1890 was reduced, as the pensioners showed only partial inability to support themselves. (Report of the Commissioner of Pensions for 1895, p. 7.) All these cases were acted upon after notice to the pensioner, and the board acted under instructions to consider all cases with liberality toward him, a rule always followed in the Department. (See, for instance, *Hayden's Case*, 7 P. D., 332.)

Under the old acts as well as under the act of 1890 there is evidently an immense number of illegal pensions. Not only is the existence of a considerable proportion of illegality in pensions a familiar fact in almost every locality, but it is clear, from a comparison of the pension statistics with the general experience of mankind, that there can not be so many persons pensionable under our existing laws as actually appear upon the rolls. By the average chances of life there should have been 1,154,810 survivors of the war on June 30, 1895. But if the evidence of the pension rolls be correct as to the number of persons disabled as a result of the war, it must follow that veterans have less than the average chance of life, and therefore that the number of survivors is considerably less than these figures. The number of invalid pensioners on that date, however, was 357,223 under the general laws and 378,115 under the act of 1890, or 735,338 in all. Of the 400,000 or less veterans not thus accounted for, 218,523 appear upon the records as claimants.

It will be remembered that a considerable proportion of these "veterans" never took part in any real war. The pension roll is open not only to the men who did the fighting, but to all the drafted and bounty men who did guard duty, provided they were on the muster roll for three months or over.

Grave reason for suspecting the existence of illegal pensions on a considerable scale is also to be found in the comparison of regimental records. Thus, a certain Ohio regiment of 861 men, which was in the service but one hundred days and never left its own State, but remained on guard duty at Gallipolis, now furnishes 152 pensioners to the roll under the "general law" (that is, the roll of those *who contracted pensionable disabilities in the service*), while 268 appear as invalid pensioners under the act of 1890, or 48¾ per cent in all. A New York regiment of 302 men which likewise had one hundred days' service in

its own State, guarding prisoners at Elmira, has only 7 men upon the invalid roll under the "general law" and 33 under the act of 1890, or 13¼ per cent in all. The Ohio regiment above mentioned affords no exceptional case. Many make equally heavy contributions to the roll, though they served but short periods of time and never saw a Confederate soldier who was not a prisoner of war.

Not more for the interests of the people at large who pay these pensions than for the credit of the veterans who did the real fighting in the war, and for whom the pension roll should be a roll of honor, it is important that some tribunal should exist with the power to strike illegal pensions from that roll in the few cases, proportionally, when their illegality is discovered and can be shown by clear evidence. From early times the Commissioner of Pensions or his predecessor, the Secretary of War, has been recognized as a tribunal with such power. None other exists.

Whether the power does belong to the Commissioner of Pensions is a question presented to this court for decision.

JURISDICTION OF THIS COURT.

It will be noticed that this case came to the Court of Appeals by appeal, but comes here by writ of error. This seems to be in accordance with the statutes and authorities.

It is, however, a matter of grave doubt whether this case belongs to any of the classes of cases which are reviewable here. The controversy involves an annuity of $22 a month, or $264 per annum. The present value of an annuity of $264 per annum to a man 54 years old (p. 20) is far less than $5,000 (2 Price on Annuities, 314, 315). Jurisdiction therefore must be sustained, if at all, under the final clause of the act of February 9, 1893, ch. 4, § 8, relating to cases—

> In which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States.

A claim that the Commissioner has misconstrued the law and thereby exercised his authority when the facts do not justify its exercise, does not bring the case within the statute. (*South Carolina* v. *Seymour*, 153 U. S., 353, and cas. cit.)

It is undisputed that the Commissioner of Pensions has authority in a proper case to annul or vacate the decision upon which the pension was granted. This is a matter of express statutory regulation. Without referring to earlier statutes, we may call attention to the Urgent Deficiency Act of December 21, 1893, ch. 3 (28 Stat., 16):

> That any pension heretofore or that may hereafter be granted to any applicant therefor under any law of the United States authorizing the granting and payment of pensions, on application made and adjudicated upon, shall be deemed and held by all officers of the United States to be a vested right in the grantee

> to that extent that payment thereof shall not be withheld or suspended until, after due notice to the grantee of not less than thirty days, the Commissioner of Pensions, after hearing all the evidence, shall decide to annul, vacate, modify, or set aside the decision upon which such pension was granted.

ARGUMENT ON THE MERITS.

It will be argued that *mandamus* against the Commissioner is not a proper remedy (I-IV); that his construction of the law applicable to Judge Long's case is plainly the correct one (V); that the latter therefore has no standing in court (VI); that it is the Commissioner's duty to stop paying a pension when it was granted without jurisdiction (VII) or when the disability has ceased (VIII), and therefore that a pensioner whose present pensionable disability is doubted must submit to examination when required (IX); and that for other reasons also this proceeding must be dismissed (X-XI).

I.

Restoration of a pension is not a ministerial act directed by any statute, and therefore it can not be compelled by mandamus.

In *State of Mississippi* v. *Johnson* (4 Wall., 475, 498, 499), Chief Justice Chase said:

> A ministerial duty, the performance of which may in proper cases be required of the head of a Department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law.

And the Chief Justice explains *Marbury* v. *Madison* (1 Cranch, 137) and *Kendall* v. *United States* (12 Pet., 524) as follows:

> In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act, and that performance, it was held, might be required by *mandamus*.

The two sentences first above quoted were quoted and approved by Mr. Justice Miller in *Gaines* v. *Thompson* (7 Wall., 347, 353).

These principles are recognized in all the *mandamus* cases from *Decatur* v. *Paulding* (14 Pet., 497) to the present time. The earlier cases are fully discussed by the undersigned in the brief filed on behalf of the Secretary of the Interior in *In re Emblen*, No. 9 original of this term. The absolutely ministerial character of the acts—acts so simple that a child could perform them—in the only three cases (*Kendall* v. *United States*, 12 Pet., 524; *United States* v. *Schurz*, 102 U. S., 378; *Butterworth* v. *Hoe*, 112 U. S., 50) where the writ has actually been allowed by this court, was pointed out in *Seymour* v. *South Carolina* (2 D. C. App., 240).

This writ is asked, not to compel an act required by statute to be performed, but to reverse an act already performed which relator claims to be contrary to the statute. Relator here confuses the spheres of law and equity. The legal remedy by *mandamus* and the equitable remedy of injunction are not concurrent, but correlative, as exercised against executive officers of the Government. They are alike in that they can not in any way revise executive discretion. A *mandamus* may be granted to compel an act in no wise discretionary. An injunction may be granted to restrain an officer from overstepping altogether the limits of his jurisdiction and exercising discretion in a sphere where no discretion is given him. The spheres of the two remedies are, however, distinct and complementary to each other. One is positive, the other negative. One compels an act, the other restrains it. (*Gaines* v. *Thompson*, 7 Wall., 347, 352, 353.)

Assuming that in instituting proceedings for the revocation of the Tanner certificate, Commissioner Lochren was overstepping the limits of his jurisdiction, relator might have been entitled, upon prompt interposition, to the remedy of injunction under the authority of *Noble* v. *Union River Logging R. R.* (147 U. S., 165). Such a suit is analogous to the well-known suit to prevent or remove a cloud upon the title to real property. That, as we submit, was his only possible remedy, if he had any remedy. He had over thirty days' time within which to institute such a suit after receiving the notice of March, 1894. He was fully informed of the point taken (p. 4.)

Relator's argument is that Commissioner Lochren's act in revoking the Tanner certificate was absolutely void for lack of jurisdiction. If the objection is not jurisdictional, if that act is not absolutely a nullity, it will, of course, be conceded that the writ does not lie. Assume, then, that the act was void; then the Tanner certificate is still in existence *de jure;* it is also in existence *de facto* and in relator's possession; hence the pension agent should pay this relator the amount of his pension. The pension agent is not a mere employee of the Commissioner. He is an officer nominated by the President and confirmed by the Senate. (§ 4778.) His bond is approved not by the Commissioner but by the Secretary of the Interior. (§ 4779.) The number and locality of the pension agencies is determined by the President. (§ 4780.) The pension agent is required to provide a voucher "for every person whose pension is payable at his agency" (§ 4764); and upon receipt of the voucher properly executed and proof of the identity of the pensioner in the manner prescribed by the Secretary of the Interior, the agent "shall immediately draw his check on the proper assistant treasurer or designated depository of the United States for the amount due such pensioner, payable to his order, and transmit the same by mail directed to the address of the pensioner entitled thereto." (§ 4765.)

If relator's claim is well founded, then the Tanner certificate has never been revoked and the pension agent at Detroit is required by

statute to send relator his voucher and follow it up with a check. If *mandamus*, by the rules of Federal jurisprudence, lies in a pension case at all, then the person to whom the writ should be directed is not the Commissioner, but the pension agent, who corresponds in this respect to the English Lords of the Treasury. (Tapping on Mandamus, p. 215.)

The inquiry thus naturally arises why this writ is sought against the Commissioner and not against the pension agent. Perhaps relator seeks relief against the Commissioner instead of against the pension agent because the pension agent is in Detroit, which is outside the territorial jurisdiction of the supreme court of the District of Columbia. That court is the only tribunal which has power to issue a writ of *mandamus* to a Federal executive officer. No other Federal court having the power to issue such a writ, perhaps relator is trying to stretch the general principles governing this remedy in order to avoid practical difficulties connected with the service of process.

It is respectfully submitted that the issuance of a writ against the Commissioner can not be based on the fact that the person against whom the writ should really be issued is absent from this District. The law does not allow that to be done indirectly which can not be done directly. It has been known to Congress since 1813 that the writ could not be issued by a circuit court. (*M'Intire* v. *Wood*, 7 Cranch, 504.) If Congress had desired to put the proceedings of executive officers outside of the city of Washington under judicial control in any way, it would doubtless have so provided by statute. That Congress has never changed the law in this respect is a significant fact. (See *Angarica* v. *Bayard*, 127 U. S., 251, 260.)

Still more significant is the recent action of Congress in depriving of all jurisdiction over pension cases the only court which at that time was supposed to have any such jurisdiction. It is well known that until recently a suit for a pension could be brought in the Court of Claims. Among well-known instances of such suits are *Harrison* v. *United States* (20 Ct. Cl., 122) and *United States* v. *Bowen* (100 U. S., 508). Congress, however, in its general revision of the jurisdiction of that court by the so-called Tucker Act of March 3, 1887, ch. 359, § 1, provided:

> That the Court of Claims shall have jurisdiction to hear and determine the following matters: first, all claims founded upon the Constitution of the United States or any law of Congress, *except for pensions*, etc.

It can hardly have been intended by Congress, in taking away this jurisdiction, silently to transfer it to another court. (See opinion of Mr. Justice Shepard, p. 69.)

This point was discussed at some length by Mr. Justice Bradley of the supreme court of the District of Columbia, in an opinion on the question of costs in January, 1894. He based his jurisdiction on

English cases establishing the general rule that *mandamus* was a proper remedy to restore a person deprived of any franchise, office, or "function which draws after it temporal rights in all cases where the established course of law has not provided a specific remedy by another form of proceeding." (*Rex* v. *Blooer*, 2 Burr., 1045; *Rex* v. *Barker*, 3 Burr., 1266.) Offices and pensions in England are regarded as properties to a great extent. But a sufficient answer to these cases is that the Federal law of *mandamus* is very different from that of England, as it is different from that of almost if not quite every one of our own States. The principles upon which the remedy is to be granted are to be drawn from the decisions of the Supreme Court of the United States, and not from the decisions of the King's Bench in London. Very little comparison of our Supreme Court decisions with the English doctrines laid down by the authorities collated in Tapping on Mandamus is sufficient to satisfy one upon this point. The jurisdiction of the supreme court of the District of Columbia as compared with that of the British King's Bench is extremely narrow.

The learned justice also relied upon *Ex parte Martha Bradstreet* (7 Pet., 634). That, however, was a *mandamus* against an inferior court, granted in the nature of an appellate remedy. There is no doubt that the Federal courts have a wide power of *mandamus* over judicial tribunals, however narrow may be the powers of their executive officers. Even over inferior judicial tribunals, however, there is not the full power to direct restoration to office which seems to be recognized in other systems of law. An inferior tribunal may, indeed, be directed to recognize an attorney unlawfully disbarred, but the court has refused to extend the principle to the recognition of a district attorney who claims to have been unlawfully removed from office. (*In re Parsons*, 150 U. S., 150.)

The narrowness of the Federal jurisdiction in these matters as compared with that of the States or of Great Britain, is not merely accidental in origin, nor is it founded in judicial error. There is grave reason, in the peculiar and vast complication of our Federal Government and of the interests which it directs and controls, for narrowing the scope of judicial interference. Interference with executive officers is one of the most delicate duties of the judiciary. The constant exercise of this duty, as it would be called for by establishing the principles here maintained by the relator, would require the judges to become experts in the law, traditions, and practice, and in the whole administration of each Department. This is a task which no man, however able, could add to the work of administering justice under the jurisdiction of the courts as now understood.

The heads of the various departments and bureaus of the Government are nearly all lawyers of high ability. The Commissioner of Pensions himself has had a long and distinguished judicial career. Each also finds himself governed by a mass of precedents forming a

statute to send relator his voucher and follow it up with a check. If *mandamus*, by the rules of Federal jurisprudence, lies in a pension case at all, then the person to whom the writ should be directed is not the Commissioner, but the pension agent, who corresponds in this respect to the English Lords of the Treasury. (Tapping on Mandamus, p. 215.)

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The heads of the various departments and bureaus of the Government are nearly all lawyers of high ability. The Commissioner of Pensions himself has had a long and distinguished judicial career. Each also finds himself governed by a mass of precedents forming a

code of law representing the experience of generations in his department; and to apply the law in the administrative work of the department or bureau requires a thorough technical knowledge of its whole legislative history and inherited usage.

For these reasons, doubtless, as well as from a desire to mark a clear boundary between the legislative and judicial departments of our Government, the Supreme Court of the United States has placed upon the *mandamus* powers of the supreme court of the District of Columbia the very rigid limitations established by *Decatur* v. *Paulding* and subsequent cases. (See brief for respondent in *In re Emblen, supra.*)

II.

Relator's contention involves a concession that the statute is ambiguous.

This is shown by the elaborate opinion of Mr. Justice Bradley, invoking the aid of prior statutes *in pari materia.*

For the court has no right to make such use of a prior statute, unless there is ambiguity in the statute to be construed. This is the case even with revisions. (*United States* v. *Bowen*, 100 U. S., 508, 513; *Dwight* v. *Merritt*, 140 U. S., 213, 217; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S., 1, 39.) "When the meaning of a statute is plain * * * there is no necessity for construction." (*Thornley* v. *United States*, 113 U. S., 310, 313.)

The mere fact that Mr. Justice Cox construes the statute one way, while Mr. Justice Bradley construes it another, would seem sufficient ground for a concession that it contains an ambiguity (pp. 68–9).

III.

If the statute is ambiguous it is Commissioner Lochren's duty to construe it, and his decision is not reviewable by writ of mandamus.

United States ex rel. Dunlap v. *Black* (128 U. S., 40) was an application for a mandamus against the Commissioner of Pensions to review his construction of one of the statutes now under consideration, namely, that of June 16, 1880, ch. 236, providing that all then receiving a pension of $50 per month under the act of June 18, 1874, ch. 298, should thereafter receive $72 per month. The Commissioner construed the act as not applying to those who, though entitled on June 16, 1880, to the $50 rating, had failed to apply for it. Relator claimed that he was entitled to the increase, notwithstanding his failure to apply for the $50 rating before the day named; that the question was one of law, and therefore that the Commissioner, having found the necessary facts, might be forced to give the desired relief. This court, speaking by Mr. Justice Bradley, said (p. 48):

> Whether if the law were properly before us for consideration we should be of the same opinion, or of a different opinion, is of

> no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision.

In *Miller* v. *Raum* (135 U. S., 200) the court made a similar decision in another case arising upon the same statute; and the Dunlap case was quoted with approval by Chief Justice Fuller in *United States* v. *Lynch* (137 U. S., 280, 286).

Other cases to the same effect are *Decatur* v. *Paulding* (*supra*); *Brashear* v. *Mason* (6 How., 92, 102); *Reeside* v. *Walker* (11 How., 272, 289); *United States* v. *Guthrie* (17 How., 284, 304); *Carrick* v. *Lamar* (116 U. S., 423, 426); *Bayard* v. *White* (127 U. S., 246, 250); *Redfield* v. *Windom* (137 U. S., 636, 644); *International Contracting Co.* v. *Lamont* (155 U. S., 303, 308); *State of Mississippi* v. *Durham* (4 Mackey, 235); opinion below, p. 68.

IV.

Hence, if Commissioner Lochren had the right to examine relator's case at all, his decision thereupon is not here reviewable.

And this is so for a further reason also. As above stated, the act must be ministerial and not executive to be subject of *mandamus*. One of the tests is the nature of the evidence upon which relator's case depends. If, as here, it depends not alone upon documents, but in part upon oral statements or affidavits, then it calls for executive discretion, and not merely for a ministerial act. (*United States* v. *Seaman*, 17 How., 225, 230; *United States* v. *The Commissioner*, 5 Wall., 563, 565; *The Secretary* v. *McGarrahan*, 9 Wall., 298, 312.)

V.

His decision, however, is plainly correct and Commissioner Tanner's action plainly illegal, as was, indeed, that of Commissioner Dudley also.

It may be remarked that this was the view taken by the Interior Department during the last Administration. During Tanner's term an investigation was made by a special committee of experts in that Department into his reratings and those of his immediate predecessor, and this one was reported as illegal. (Secretary Noble's Report of April 25, 1890, H. R. Ex. Doc. No. 360, Fifty-first Congress, first session, pp. 93, 94.) Tanner's resignation followed shortly the report of the committee.

Examining the Long case and the statute of June 18, 1874, with its proviso, the committee condemn both the Dudley and the Tanner ratings, saying:

> The proviso restricts the act to the cases of persons who require such aid and attendance because of total and permanent helplessness. It does not appear from the evidence that the condition of the pensioner was ever one of total helplessness. The evidence does not justify the action increasing the pension to

$50 per month under the act of June 18, 1874. The pensioner *did not allege* a condition of total helplessness. The action increasing the pension to $50 per month and rerating it from June 4, 1874, was not in accordance with law.

It will be remembered that Mr. Dudley gave a $50 rating, which is the figure at which the pension is now again placed by Judge Lochren. It will be shown, however, that the rating was illegal when Mr. Dudley gave it, and that relator was not entitled thereto until 1892.

The statute covers only cases of "total helplessness." Relator is certainly not totally helpless in the ordinary meaning of the English language. He supports himself handsomely by his own labor.

That a supreme court judge, in active performance of his duties, is entitled to the highest rate of disability pension provided by Congress, a disability described in terms more naturally applicable to paralytics or persons equally unable to maintain themselves, is a proposition at least startling. The Commissioner's annual report for 1895 showed 357,223 persons receiving invalid pensions for disabilities incurred in the service. Of these, only 2,886 received the $72 rating which Judge Long claims, and only 24 got more than that amount. Even now that he is relegated to the $50 class, he is in a class containing only 684 persons, and fares better than 353,613 other injured veterans.

Before analyzing the statutes the element of departmental construction should be referred to. The part which this element may play is now well settled. When the statute is ambiguous and the departmental practice has been uniform it has great weight. (*United States* v. *Hill*, 120 U. S., 169.) When the practice has not been uniform it has no weight. (*Merritt* v. *Cameron*, 137 U. S., 542.) Under this statute the practice has, perhaps, not been sufficiently definite and uniform to be decisive. Secretary Chandler in 1876 construed it as "referring not only to the physical helplessness," etc., but also to "inability to gain a subsistence by his own exertions" (Pension Digest of 1885, p. 202); as including cases of helplessness "to perform any kind of remunerative labor, and physical helplessness." (*Id.*, p. 251.) In *Collett's Case*, described by Mr. Justice Bradley, a case similar to this relator's in some respects, but much worse, Secretary Teller refused the $50 rating; but it was afterwards granted by Assistant Secretary Joslyn. (*Id.*) In *Miller's Case* (described in 135 U. S. at pp. 201, 202) Secretary Teller allowed the $50 rating, overruling both the Commissioner of Pensions and a former ruling of his own. He seems to have overlooked the words "total helplessness" in the statute, and read it as if it contained only the requirement of regular personal aid and attendance. A stricter construction, which would exclude the present relator, was given by Assistant Secretary Hawkins in *Posson's Case* (2 P. D., 36, 39); by Assistant Secretary Bussey in *Garfield's Case* (4 P. D., 258), and in *Jones' Case* (5 P. D., 159), and by Assistant Secretary Reynolds in *Beers' Case* (7 P. D., 113). The disapproval of this relator's pension by Secretary Noble's special investigating committee we have already

referred to. For examples of permanent total helplessness, see *Wood's Case* (3 P. D., 310); *Nolte's Case* (4 P. D., 252); *Harrison's Case* (5 P. D., 279); *Conaty's Case* (6 P. D., 238, 240).

On the merits little need be added to the able analysis of Mr. Justice Cox, contained in the appendix hereto.

The argument of Mr. Justice Bradley assumes that Congress must have meant the cases covered by the act of 1874 to be the same as those covered by the act of 1873 *in pari materia* (the section of the Revised Statutes concerning this order of injuries being assumed to have failed of effect *ab initio*, since the revision was enacted June 22, 1874, and is to be construed as an act of December 1, 1873, so that it is superseded *pro tanto* by any intervening act). We set forth the ratings established by the two acts in parallel columns:

March 3, 1873, ch. 234, § 4.

Persons who "shall have lost the sight of both eyes, or shall have lost the sight of one eye, the sight of the other having been previously lost, or shall have lost both hands, or shall have lost both feet, or been permanently and totally disabled in the same, *or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular aid and attendance of another person*," $31.25.

Persons who "shall have lost one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing manual labor, but not so much as to require regular personal aid and attendance," $24.

* * * "*Provided, That the pension for a disability not permanent, equivalent in degree to any provided for in this section, shall, during the continuance of the disability in such degree, be at the same rate as that herein provided for a permanent disability of like degree.*"

June 18, 1874, ch. 298, provides that § 4 of the act of 1873 "be so amended" that—

Persons who "*shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person*, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, *or by any other injury resulting in total and permanent helplessness*," $50.

"And this shall be in lieu of a pension of $31.25 per month granted to such person by said section: *Provided*, That the increase of pension shall not be granted by reason *of any of the injuries herein specified, unless the same have resulted in permanent total helplessness, requiring the regular personal aid and attendance of another person.*"

The differences between the two acts are very striking. The act of 1873 is distinctly broader. The $50 men of 1874 were all $31.25 men of 1873, but all the $31.25 men of 1873 do not become $50 men in 1874.

All men, for instance, who had lost both feet became entitled to the $31.25 rating in 1873. Lest they should all be supposed to come in under the higher rating of 1874, a proviso was added to show that it

was not intended to apply to all persons suffering from "any of the injuries herein specified" (loss of both eyes, both hands, or both feet), but only to cases of "permanent, total helplessness," or if the proviso above quoted from the act of 1873 be applicable to the act of 1874, as we believe, to cases of "total helplessness," whether permanent or not.

And this condition of "total helplessness" is not a condition common to all persons who need the "regular aid and attendance of another person."

The statute of 1873 had already recognized, as three several classes of pensioners, first, those "so permanently and totally disabled as to render them utterly helpless," that is, those in a state of permanent total helplessness; second, those so nearly helpless "as to require the regular aid and attendance of another person;" third, those "incapacitated for performing manual labor, but not so much so as to require regular personal aid and attendance." That statute also recognized different degrees of permanent total *disability;* but "total disability" had already received a technical signification, growing out of the act of 1862 and prior legislation, and very different from "total helplessness." (*Burnett* v. *United States*, 20 C. Cls. R., 190, aff. 116 U. S., 128.)

It is respectfully submitted that Mr. Justice Bradley overlooks the distinction between the first and second classes in the statute of 1873, a distinction clearly in mind of the legislators in 1874, and clearly pointed out by Mr. Justice Cox.

The restrictive clauses of the statute of 1874 must receive careful attention. Had the new rating been intended to apply to all the $31.25 men of 1873, the language of the act of 1873 would have been repeated, either *in hæc verba* or by reference, as in the act of June 16, 1880. But the wording was changed, and, presumptively, the meaning was changed also. (*Rich* v. *Keyser*, 54 Pa. St., 86, 89.)

As remarked by Chief Justice Marshall in *Pennington* v. *Coxe* (2 Cranch, 33, 59, 60):

> Where the provisions of two acts are so unlike each other that the comparison exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say that the one act exhibits a legislative mind materially variant in the particulars where the difference exists from what is exhibited by the other. * * * If the difference exists, it must be respected, whatever may be the motives which produced it.

That the whole $31.25 class of 1873 were not to have their pensions jackscrewed up to $50 by the act of 1874 appears most conclusively by examination of the legislative history of the latter act. This shows that the intent of the original framers of the new legislation was to make it apply to the whole class, but that they were overruled by Congress in this respect.

The bill which became the act of June 18, 1874, was the bill H. R. No. 735 of that year. It is proper in considering this act to note the origi-

nal form of the bill and the changes made by Congress by way of amendment. (*Blake* v. *National Banks*, 23 Wall., 307; *United States* v. *Burr*, 159 U. S. 78.)

The bill as originally reported by Mr. Rusk, of Wisconsin, from the Committee on Invalid Pensions, March 11, 1874, repeated the language of the act of March 3, 1873, relating to the higher of the two classes of disability, and merely changed the rate of pension from $31.25 to $50 per month. The bill passed the House in that form. (Congressional Record, p. 2131.) The Senate Committee on Pensions, by Mr. Pratt, of Indiana, reported the bill on May 29, 1874, with important amendments. They struck out the following words:

> Shall have lost the sight of both eyes, or shall have lost the sight of one eye, the sight of the other having been previously lost, or shall have lost both hands, or shall have lost both feet or been permanently and totally disabled in the same, or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person.

The following words were inserted in lieu thereof:

> Shall have been so permanently and totally disabled as to require the constant personal aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be, etc.

By a further amendment the following proviso was added at the end of the bill:

> *Provided*, That the increase of pension shall not be granted by reason of any of the injuries herein specified, until the same have resulted in permanent total helplessness requiring the constant personal aid and attendance of another person. (Cong. Rec., p. 4391.)

It will be seen that the following changes were deliberately made in the bill: First, the element of partial helplessness was stricken out of it; second, none of the varieties of disability mentioned in the law were to be sufficient to earn the $50 pension unless resulting in "total helplessness."

Up to this point we have assumed that relator's case belonged to the $31.25 class of 1873. It is submitted, however, that this is not the case; that the semi-daily dressing of his wound was not the "regular personal aid *and attendance* of another person," nor was his need of such aid the condition of nearly utter helplessness contemplated by the statute of that year; but that some more constant attendance was contemplated.

This view is confirmed, so far as any statutory construction can be confirmed by long subsequent Congressional recognition and approval of the departmental practice, by the act of July 14, 1892, ch. 169, enti-

tled "An act to establish an intermediate rate of pension between $30 and $72 per month" (all the $50 pensioners of 1874 having been raised to $72 per month by the act of March 4, 1890, ch. 25). The act of 1892 was made to apply to all injured veterans "totally incapacitated for performing manual labor * * * disabled to such a degree as to require *frequent and periodical, although not regular and constant*, personal aid and attendance of another person." This act precisely fits the case of the relator (*Hill's Case* 7 P. D., 142), and confirms the then prevalent construction of the Interior Department, by which such injuries were held insufficient for the purposes of the acts of 1874, 1880, and 1890. If Congress, learning of these rulings, had disapproved them, it would have adopted the $72 rating of such cases. It learned of them, approved them as declarations of the existing law, considered the law insufficiently regardful of this class of cases, *but also considered the $72 rating too high.*

This is the act which appellant's counsel so persistently refer to as the basis of an alleged claim that it operated as a reduction of pensions. It may be charitable to infer that they fail to perceive the distinction between reducing a pension rate and recognizing the correctness of a departmental construction by which the rate is ascertained.

The only debate on the bill was in the House of Representatives, which acted on the statements of Mr. McKinney, of New Hampshire. (Cong. Record, June 29, 1892, p. 6168.) He refers to the $72 rating as applicable to one who "requires a constant attendant," and comments on the injustice of allowing no intermediate rating between that and $30. The undersigned is informed by General Bussey, Assistant Secretary of the Interior under the then Administration, that the bill was introduced at his suggestion to cover just such cases as this relator's. (See his opinion in *Barnum's Case*, 6 P. D., 175.)

To this new $50 rating Commissioner Lochren has now reduced the relator, by the new certificate issued May 1, 1894.

VI.

Relator not being entitled to the $72 rating, he has no standing in court; it is therefore immaterial whether or not Commissioner Lochren had the power to review his predecessor's unlawful act.

The moment it is admitted that relator is not in a condition of "total helplessness," then his position becomes extremely technical. In effect, he says: "It is true that I got an illegal rating from Commissioner Dudley over the protest of his medical force. It is true that I got another illegal rerating from Commissioner Tanner in a very illegal way. It is true that I have drawn $72 a month for twenty years past when the statute gave me only $30, or, within the past three years, $50. Nevertheless, the Commissioner can not touch me, because the Dudley and Tanner decisions are *res adjudicata* as against the Government."

Perhaps it is for this reason that he escaped from a court of equity and came into a court of common law, thinking that he would thus escape the application of the principles peculiar to equitable discretion. Escape, however, is impossible, for *mandamus* also is discretionary in character. "The writ of *mandamus* is subject to the legal and equitable discretion of the court." (*Life Insurance Co.* v. *Wilson's Heirs*, 8 Pet., 291, 302.) "Relator must show right in himself; it is not sufficient to show merely an absence or want of right on the part of the respondent." (2 Spelling on Extraordinary Relief, § 1370.) "No court should allow a writ of *mandamus* to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." (*State* v. *Phillips County*, 26 Kans., 419; *Wiedwald* v. *Dodson*, 95 Cal., 450, 454.) "The exercise of the jurisdiction rests to a considerable extent in the sound discretion of the court. * * * Cases may therefore arise where the applicant for relief has an undoubted legal right for which *mandamus* is a proper remedy, but where the court may, in the exercise of a wise discretion, still refuse relief." (High on Extraordinary Relief, § 9.) "The writ is never granted for the purpose of compelling the performance of an unlawful act, or of aiding in carrying out an unlawful proceeding." (*Id.*, § 40; *People ex rel. Sherwood* v. *State Board of Canvassers*, 129 N. Y., 360, 370; *People ex rel. Woods* v. *Assessors*, 137 N. Y., 201, 204.)

The Sherwood case is an interesting application of the rule. Sherwood was a candidate for the position of State senator, but was ineligible to the office. He got a majority of the votes, but under the constitution of the State his competitor was entitled to the office. The State board of canvassers threatened to issue the certificate of election to the competitor. This they had no right to do, for their function was only to certify which candidate had the more votes. Sherwood applied to the courts for a *mandamus*. His application was denied, because, while the board of canvassers were exceeding their jurisdiction, Sherwood was likewise in an illegal position.

As, however, Commissioner Lochren clearly had the right to reconsider in the premises, we proceed to discuss that branch of the case.

VII.

Commissioner Lochren had jurisdiction to reexamine decisions of his predecessors claimed to be absolutely illegal. Such decisions were nullities, and so were the pension certificates granted thereunder. This principle applies to the Tanner certificate.

For the purposes of this point we assume that, as held by the Interior Department under Secretary Noble and as above argued, the action of Commissioners Dudley and Tanner was illegal in holding relator to be within the act of 1874.

Relator claims, Mr. Justice Cox and the Court of Appeals deny, but

Mr. Justice Bradley maintains this extraordinary proposition to be true: That a case can always be reconsidered at request of the pensioner, with a view to raise the pension, but can never be reconsidered in protection of the Government, no matter how outrageously excessive the rating may be.

There is no law expressly granting the right to reconsider, either way. On the other hand, there is no law expressly prohibiting it. The question is therefore one of construction.

We shall argue (*a*) that the Commissioner's general powers cover the case; (*b*) that it is confirmed by departmental practice; (*c*) that it is recognized by statute and judicial decision; (*d*) that the general rule against reconsideration of departmental decisions in not a rule of *stare decisis*, but applies at most only to the extent of the particular sums of money involved in the decisions, or the property transferred thereunder, and only when the decision was within the officer's jurisdiction to make; (*e*) that a pension certificate is not property within this rule; (*f*) that the custom of the Pension Office not to reconsider applies only to mistakes which in a law court would be called errors as distinguished from jurisdictional defects; (*g*) and that Dudley's and Tanner's mistakes were of the latter character.

(*a*) The Pension Commissioner's powers are very general and sweeping where not expressly limited by statute. They are derived primarily from the provision which is now Rev. St. § 471:

> The Commissioner of Pensions shall perform, under the direction of the Secretary of the Interior, such duties in the execution of the various pension and bounty land laws as may be prescribed by the President.

His powers are thus largely dependent on directions of the Secretary of the Interior (or his predecessor, the Secretary of War) and of the President—directions, many of them given prior to 1800, when the records of the Pension Office were destroyed by fire. (See acts of April 30, 1790, ch. 37; July 16, 1790, ch. 27; March 3, 1791, ch. 98; May 8, 1792, ch. 136, etc.) In other words, the definition of the Commissioner's general powers is largely a matter of departmental tradition and practice. His power to grant pension certificates is by inference merely. It is nowhere expressly provided by statute that he should do so.

(*b*) Departmental practice from the earliest times has recognized his right to examine into pensions which are illegal as distinguished from fraudulent.

One of the earliest records of the Pension Office, after the fire of 1800, above mentioned, is a letter of December 22, 1803, notifying one Captain Sommerville that he had been overpaid by an erroneous construction of a pension act and must refund the difference. Soon after the General Revolutionary Pension Act of March 18, 1818, ch. 305, providing for all veterans who had served "nine months or longer at any period of the war *under continental establishment*," and were in need

of assistance, etc., mistakes of law arose in the Pension Office (then part of the War Department), and were made the subject of Congressional inquiry in 1819. Secretary Calhoun, on December 22, 1819, reports to the House Committee on Revolutionary Pensions as follows:

> It will be proper here to observe that at first occasional errors were committed in determining the character of certain regiments or corps, and some were considered continental, which on full inquiry proved not to be so. Where such errors have been committed they have been corrected, and those improperly admitted have been dropped from the list of pensioners.

This information was repeated by Secretary Calhoun in a letter to Speaker Clay on January 19, 1820. No disapproval of the practice was indicated by Congress, and it continued unquestioned until within the past three or four years.

Of this immemorial practice the court is bound to take judicial notice when its attention is called thereto by counsel. (*United States* v. *Bailey*, 9 Pet., 238, 255–6.) It must be held to settle all questions of doubt. (*United States* v. *Hill*, 120 U. S., 169, 180–3; *Robertson* v. *Downing*, 127 U. S., 607, 613; *Schell's Executors* v. *Fauché*, 136 U. S., 562, 572; Endlich on Interpretation of Statutes, § 360, and cases cited.) "Of course the question is at rest and it ought not now to be pursued." (*The Laura*, 114 U. S., 111; *Stewart* v. *Laird*, 1 Cranch, 249, 308; *McPherson* v. *Blacker*, 146 U. S., 1.)

It must be remembered that the position of this relator with reference to revocations for illegality would apply also to revocations for fraud. Examination of the statutes relating to pensions from 1789 down to this date will show that no express power of revocation, even for fraud, has ever been given except by one or two special statutes relating to special subjects. Yet the existence of this power to revoke under the general powers of the Commissioner has been recognized by departmental practice from the beginning.

That the revisory power of the Commissioner has reached no new development, except by its extensive application in respect to the illegal ratings of the Raum administration under the act of June 27, 1890, is shown by the following tables:

The number of veterans of the civil war whose pensions have been reduced during the last twelve fiscal years is as follows:

Year.	Under general laws.	Under act of 1890.
1884	553	.....
1885	193	.....
1886	199	.....
1887	307	.....
1888	211	.....
1889	118	.....
1890	56	.....
1891	268	.....
1892	382	.....
1893	236	2
1894	532	2,670
1895	461	20,362

The number dropped from the pension rolls for causes other than death and "failure to claim" is as follows:

Year.	Under general laws.	Under act of 1890.
1884	3,355	.....
1885	1,500	.....
1886	2,832	.....
1887	1,684	.....
1888	1,703	.....
1889	1,657	.....
1890	1,141	.....
1891	617	1,047
1892	335	1,392
1893	1,202	270
1894	436	3,860
1895	732	7,825

The number so dropped from the rolls affords a fair test of the comparative numbers dropped or reduced for fraud or invalidity in original pension, or because found to be no longer suffering from pensionable disability; although in each year it contains a small percentage names dropped for miscellaneous causes, such as election to accept instead a pension under the Mexican war act.

There is no distinction in principle between revocation for fraud and revocation for illegality. One is as detrimental to the Government as the other. The Government is as much entitled to reconsider when the pension was increased by recklessness or collusion on the part of a Commissioner or on the part of some clerk to whose work the Commissioner's name was stamped, as when imposition has been committed by the applicant.

The rule of *res adjudicata* can not be applied to departmental practice with the same strictness as it is applied to the decision of a court. An adjudication in court usually implies a careful consideration by a trained legal expert, after full hearing of counsel for two conflicting parties. The work of a great Government bureau like the Pension Office is necessarily done almost wholly by clerks who act on *ex parte* statements and with comparatively little legal skill. The work of the head of the department must, in the great majority of cases, amount to little more than a signature. Here even the signature is stamped. If the doctrine of *res adjudicata*, maintained by this relator, were to be established, it must result in great harassment and delay to pensioners. The Commissioner of Pensions will be obliged to consider cases very differently, and the work will pass through his hands at a very moderate speed. If any such doctrine had been established, the work of the office would be immensely more in arrears than it is now. If it should be established, future cases would fall into arrears, while thier the fra now standing given to past cases, allowed under a different theory., notifyings new operate as a very gross fraud upon the people of the United S erroneous would

It is submitted that there is no practical rule, and no rence. Soo states. pensioners and applicants for pensions, except the rule 18, 1818. ule fair to months oe which has ment," and

always prevailed, namely, that the work should be treated as of an executive rather than of a judicial nature, and transacted at a comparatively high rate of speed in the effort to enroll all deserving applicants during their lifetime; with the necessary corollary that when it shall appear that through this system the authority of the Bureau has been exceeded in special instances, there shall be a right to reconsider; and that the really judicial work of the Bureau shall be on such reconsideration rather than in passing upon the original application. That, at any rate, has been the established practice; and we respectfully submit that it has all the force of law.

(*c*) This practice of reconsideration has been recognized by Congress and by judicial decision.

It is to be borne in mind, as above stated, that the express powers of the Commissioner no more include revocation for fraud than they do revocation for illegality.

Among other statutes recognizing this right of revocation, however, we may refer to the act of July 25, 1882, chap. 349. § 4744 of the Revised Statutes authorizes the Commissioner of Pensions to detail the clerks in his office for the investigation of—

> Suspected attempts at fraud on the Government through and by virtue of the provisions of the pension laws.

§ 2 of the act of 1882 enlarged this authority so that the detail could be for investigation—

> Into the merits of such pension or bounty land claims whether pending *or adjudicated*, as he may deem proper.

No special authority for revocation or suspension of pensions is given by this section in its original or amended form. The amendment, however, very clearly recognizes a power of revocation, for without it the power of investigation would be of little value. It also drops the single specification of "fraud on the Government," evidently intending to extend the Commissioner's powers so that he might investigate also for illegality.

§ 4 of this act of 1882 authorizes the appointment of surgeons by the Commissioner to—

> Make such examination of *pensioners and* claimants for pensions or increased pension as he shall require;

and for a resulting medical certificate containing—

> A full description of the physical condition of the claimant at the time, which shall include all the physical and rational signs, and a statement of all structural changes.

§ 4775 of the Revised Statutes also requires "special examinations of *pensioners or* applicants for pension."

The act of June 21, 1879, repealing the provisions for biennial examinations of pensioners, provides—

> That the Commissioner of Pensions shall have the same power as heretofore to order special examinations, whenever, in his

judgment, the same may be necessary, and to increase *or reduce the pensions according to right and justice.*

The act of December 21, 1893, ch. 3, also recognizes this as a pre-existent right. (Record, p. 72.) This act provides that a pension—

> Shall be deemed and held by all officers of the United States to be a vested right in the grantee, to that extent that payment thereof shall not be withheld or suspended until, after due notice to the grantee of not less than thirty days, the Commissioner of Pensions after hearing all the evidence shall decide to annul, vacate, modify, or set aside the decision upon which such pension was granted. Such notice to the grantee must contain a full and true statement of any charges or allegations upon which such decision granting such pension shall be sought to be in any manner disturbed or modified.

This, it will be perceived, recognizes the right to annul, etc., as already existing, and it is so construed by Mr. Justice Cox and by the court of appeals. Appellant's brief concedes that it applies to cases of "fraud or illegality." As this is a case of illegality nothing more need perhaps be said. It may be questioned, however, whether the act applies at all to cases where, as here, the pension is absolutely without warrant in law—where no jurisdictional facts were alleged or found or actually existed. In such cases the original award of a pension was void *ab initio.* (See *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 173–176.) This question does not seem sufficiently important for the purposes of the present case to discuss at length.

Appellant, however, goes further, and advances the extraordinary claim that "Congress intended to make a pension a vested right of property the same as a grant of lands by patent." Upon this claim Mr. Justice Cox said:

> The language as to "a vested right" has no significance. The whole act amounts to nothing but a prohibition to suspend or withhold the pension without giving at least thirty days' notice of a hearing, followed by a decision upon all the evidence.

Attorney-General Olney, in the course of his discussion of this statute, said (20 Op., 736, 737):

> I have not overlooked the fact that the statute uses the words "vested right," and that the attribute thus given to these pension certificates is not one belonging to other vested rights. Contracts and judgments are vested rights, yet payments under a contract induced by fraud or even mutual mistake of fact, and payments under a judgment induced by fraud or even invalid for some jurisdictional defect, may properly be withheld *pendente lite*, and proceedings to collect the money will be restrained when necessary by an injunction from the courts. The right to withhold payments in such cases, pending legal investigation, belongs to the Government as well as to the individual. "It repeatedly and unavoidably happens in transactions with the Government that money due to an individual is withheld from him for a time and payment suspended in order to afford an opportunity for

more thorough examination." (*Kendall* v. *Stokes*, 3 How., 87, 98.) If, therefore, the statute under consideration declared a pension lawfully granted to be a vested right, and stopped there, it would doubtless be altogether without legal effect upon the practice of suspension pending investigation under charges of fraud.

But the statute plainly shows a contrary intent. It is to be read as if it simply provided that pensions which have been granted as therein described should not be withheld or suspended until after due notice, etc.

The sole effect of this statutory provision (which, as will be noticed, is attached to an urgent deficiency appropriation act) is to put an end to the ancient practice, dating from the earliest history of our Government, and till then exercised freely by all administrations, of suspending payment pending examination of pensions apparently fraudulent. Attorney-General Olney says (20 Op., 736):

> The Commissioner states, as an example, that there are some hundreds of suspended pensions involved in frauds at Norfolk, Va., part of which at least are confessedly based on perjury and even forged testimony, the claim agent being now in the penitentiary, and several of his accomplices having been also convicted. A still larger number in New Mexico are said to be in the same position, the claim agent having pleaded guilty and being now in the penitentiary. Some hundreds of pensions obtained by a claim agent in Iowa are stated to have strong presumptive evidence of fraud, over thirty indictments having been returned against him by the grand jury. Yet the Commissioner states that at the time of writing the evidence upon these pensions is not all in. If the proviso under consideration applies to pensions granted upon forged or fraudulent papers, then the United States must pay out large sums of money in cases like these without any hope of its subsequent recovery.
>
> If there were any room for doubt as to the meaning of the statute, courts would lean strongly against a construction carrying such extraordinary results. I can find, however, no ambiguity in it so far as it bears on this question. It clearly applies to every certificate that has been lawfully granted by the Pension Office, whether the evidence upon which the office acted was complete or incomplete, honest, fraudulent, or forged. Such certificate may still, of course, be canceled upon charges made, but until the thirty days' notice is given, the evidence received, and a decision reached, the money must continue to be paid, even though the crime has been confessed and the criminal may be already serving his term of sentence. In fact the statute practically abolishes the right to suspend payments *pendente lite* in these cases.

The act, however, leaves the right of final revocation, after due notice and hearing, where it was before.

Mr. Justice Bradley refers to § 4739 of the Revised Statutes as giving the power to strike from the rolls in case of fraud, and infers that such power would not have existed otherwise. This statute is a revision of an act of February 14, 1871, applicable to pensioners of the war of 1812. The learned Justice's argument is that this "expressing possession

of power * * * in pensions of the 1812 war is the exclusion of such power" otherwise (p. 55). It is certainly remarkable if an implied power of the Commissioner, dating from 1790, should be regarded as taken away from him in 1871, simply because it is given to the Secretary of the Interior in a single instance. It is respectfully submitted that no argument can be so inconclusive as one of this kind, when the court is treating such a mass of detailed legislative provisions enacted by different Congresses as are found in our pension legislation.

We are not confined, however, to Congressional recognition. We have also an express adjudication by a court which at the time it was made had jurisdiction, and exclusive jurisdiction, over pension cases. We refer to the case of *Harrison* v. *United States* (20 C. Cls., 122). In this case the Secretary of the Interior dropped a pensioner's name from the rolls upon an *ex parte* report of special agents of the Pension Bureau charging him with fraud. He sued in the Court of Claims and his counsel, as in this case, relied largely upon the case of the Bank of the Metropolis, claiming that executive officers have no right to revoke adjudications made by their predecessors. Mr. Justice Scofield, delivering the opinion of the court, first discussed § 4739 of the Revised Statutes, holding it doubtful whether this section was or was not confined in its operation to veterans of the war of 1812, and drew from § 4720, conferring upon the Commissioner power to suspend payment of pensions granted by special acts of Congress, an argument that "in the judgment of Congress the Secretary and Commissioner already had power over pensions allowed by themselves." He called attention also to the argument above made with relation to § 4744 and the amendatory act of July 25, 1882, saying:

> We can not suppose that Congress intended that evidence of fraud thus obtained should be laid away in a pigeon hole. It must have been intended for use; and in what way could it be used except in a revision of the pension rolls?

The learned court then concludes its discussion as follows:

> Aside from these statutes, the power of revision, as the Government counsel has argued, may well be considered to be inherent in the nature of the first decision as well as in the necessities of the Bureau. * * * The law describes a class of persons upon whom it chooses to bestow its bounty. The Secretary and Commissioner are directed to find out and make a list of persons thus described. The proceedings and evidence are largely *ex parte*. From the vast number of applicants, the work must be performed and the roll made up, for the most part, by the clerks. If placing the name of an applicant upon the roll is to be considered a judicial act, should it not be considered only a judgment *nisi*? The practice of the Department to drop from the roll names that have been placed there by misrepresentation and fraud is of long duration. Even if the Secretary's construction of the statute were doubtful, we should not feel called upon, under former rulings of this court and the Supreme Court, to overturn a practice long continued, apparently necessary for the

honest administration of the pension laws, well known to Congress, and supported at least indirectly by the many provisions of law above cited.

(*d*) There is, no doubt, a general principle, often very broadly stated, precluding reconsideration of departmental decisions. This is not, however, a rule of *stare decisis*. Neither does it correspond in the fullest sense with the rule of *res adjudicata* as applied to judicial decisions. To begin with, the Commissioner of Pensions is an officer of limited jurisdiction. His decisions when without his jurisdiction are similar to those of various inferior courts and tribunals, and are absolutely void. (See *Noble* v. *Union River Logging R. R.*, 147 U. S., 165, 173–6, and cases cited.) This rule against reconsideration, when the officer has acted within his jurisdiction, is often applied to the extent of debarring reconsideration as to the particular sum of money involved in the decision or as to the particular property transferred thereunder. It is not applied as the corresponding principle is applied with relation to judicial decisions, so as to make the ruling conclusive as to the principle involved as well as the particular sum of money or piece of property transferred. Thus, if accounts are passed by the accounting officers of the Treasury, it is often considered improper or even illegal to rip them up again. If, however, the Auditor or Comptroller concludes that he has passed illegal accounts, he may raise the question when the next payment falls due, and decide it unembarrassed by his previous decisions. (See opinion of Mr. Justice Shepard, p. 72.)

The learned justice relies largely on *United States* v. *Bank of the Metropolis* (15 Pet., 377, 400–1). That case related to a certain settlement of accounts made by Postmaster-General Barry with a contractor. Barry's successor, Amos Kendall, concluded that the credits allowed were illegal, and accordingly, when the endorsee of certain acceptances given to the contractor sued the United States thereon, he directed these credits to be set up as a counterclaim. The court found the credits to have been correctly allowed. It also held that the statute under which Mr. Kendall was acting "excludes him from determining finally any case which he may suppose to arise under [it]. His duty is to cause a suit to be brought." It also held that the plaintiff was a *bona fide* holder of the acceptances; and upon this point, in the opinion of the court of appeals in the present case, the decision really turned (p. 70). Mr. Justice Wayne made some remarks *obiter*, which have been often quoted in the lower courts, to the effect that the Postmaster-General's powers did not extend to reviewing credits allowed by his predecessor except in the case of "mistakes in matters of fact arising in *errors of calculation*, and to cases of *rejected* claims in which material testimony is afterwards discovered and produced." This language has never been followed here. The course of decisions has been much to the contrary.

The Floyd Acceptances (7 Wall., 666) was a suit on certain drafts

accepted by John B. Floyd as Secretary of War, but thrown out by the accounting officers. The court held that he had no jurisdiction to accept the paper, and that the holders of the paper were bound to take notice of this fact. (See, also, *United States* v. *Insley*, 130 U. S., 263–266.) The holders relied on the Bank of Metropolis case, which Mr. Justice Miller, however, said was decided on the ground that the officer who accepted the draft was "authorized to do so," but said of the acceptances at bar:

> The transaction by which these drafts were accepted was in direct violation of this law and of the limitations which it imposes upon all officers of the Government. Every citizen of the United States is supposed to know the law (p. 682).

In *Hunter* v. *United States* (5 Pet., 173, 187–8) Mr. Justice McLean said:

> It might be dangerous to give the same effect to a voluntary payment by an agent of the Government as if made by an individual in his own right. * * * It can not be admitted that an omission of duty of this kind, as a payment through mistake by an officer, shall bar the claim of the Government. If in violation of his duty an officer shall knowingly, or even corruptly, do an act injurious to the public, can it be considered obligatory? He can only bind the Government by acts which come within a just exercise of his official power.

In *United States* v. *Jones* (8 Pet., 375, 385) the same justice said of the acts of the accounting officers of the Treasury:

> So far as they act strictly within the rules prescribed for the exercise of their powers, their decisions are in effect final.

In *United States* v. *Macdaniel* (7 Pet., 1), as Mr. Justice Cox points out, "it was not suggested even that the first construction was a final determination that could not be reviewed by a succeeding Secretary."

In *Whiteside* v. *United States* (93 U. S., 247, 257), it was claimed that the United States was bound by a contract made by a Treasury agent. In overruling this claim Mr. Justice Clifford said:

> Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations of collusion, might be turned to the detriment and injury of the public. * * * Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity.

The law was again laid down to the same effect in *Hawkins* v. *United States* (96 U. S., 689, 691).

In *McElrath* v. *United States* (12 Ct. Cls., 201, 216–218), the court held that the Government can recover moneys paid by its agents through mistake of law, when the mistakes are not mere errors of judgment in matters of which they have jurisdiction, but when the agents had gone

beyond their jurisdiction. (See also *McKee's Case*, 12 Ct. Cls., 504, the opinion of Judge Nott and dissenting opinion of Chief Justice Drake both agreeing on this point.) The Supreme Court affirmed the McElrath Case without passing upon this question. (102 U. S., 426, 440–441; see argument of Attorney-General Devens, pp. 435, 441.)

In *Steele* v. *United States* (113 U. S., 128, 134), the Government was allowed to set off payments made by mistake of law, Mr. Justice Woods saying:

> The fact that the account had been settled by officers of the Navy Department did not cure the unauthorized acts. Both the disposition of the property and the settlement of the account were without authority of law and not binding on the Government.

In *United States* v. *Johnston* (124 U. S., 236, 253), Mr. Justice Harlan, while holding the United States bound by the Treasury approval of its agents' expenses, said that the approval "would not be conclusive if it appeared * * * that such expenses were incurred in violation of some positive statute or in contravention of public policy."

A Commissioner of Pensions has no higher authority in the judicial world than a Judge of Probate or a Prize Court or a Court Martial or a Commissioner of the General Land Office or a Commissioner in Bankruptcy. The rules applied to him, therefore, are those laid down in the familiar case of *Noble* v. *Union River Logging R. R.* (147 U. S., 165, 173–6):

> In every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity. * * * In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.
>
> There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, can not be attacked collaterally. * * * In this class of cases, if the allegation be properly made and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding.

The principle is a familiar one in proceedings relating to public lands. There, as upon application for pension, the proceedings are usually *ex parte* and the Government liable to inadvertent errors in law as well as in fact, ——— to frauds in which its own clerks assist as well as to impositions on its clerks by applicants. It is well settled that a land patent issued by mistake of law may be vacated if the rights of third parties have not intervened. (*United States* v. *Stone*, 2 Wall., 525, 535; *United States* v. *Minor*, 114 U. S., 233, 243–4; *Mullan* v. *United States*, 118 U. S., 271; *United States* v. *Marshall Mining Co.*, 129 U. S., 579, 582; *United States* v. *Missouri, Kansas and Texas R. R. Co.*, 141 U. S., 358, 382.)

In these cases, as in pension cases, it is ordinarily impossible to prove, or even guess, whether the case is one of genuine mistake or of collusion on the part of some Government clerk.

It is true that in land cases, when patents have issued, the Government's remedy is in the courts, and there alone. (*Noble* v. *Union River Logging R. R., supra.*) It is because *title to property has passed* from the United States. After title passes, an Executive Department can not interfere for obvious reasons, *nor can Congress interfere itself.* It is therefore necessary to go into the courts to recover the property. The same rule would hold of necessity as to recovering back money already paid out on an illegal and void pension certificate. (See *United States* v. *Lalone*, 44 Fed. Rep., 375.) It does not hold, however, in cases where no title has passed from the United States.

Is, then, a pension certificate in the nature of a title deed? Does it evidence a present transference of the right to an annuity? Is its delivery similar in effect to the common purchase of an annuity in England or to the maturing of an endowment insurance policy? In fact, to use the now current phrase, does its delivery confer upon the pensioner a lifelong vested right?

(*e*) There seems to be a strange delusion in the public mind about pension certificates. There is no express statutory authority for such a certificate. Like the Commissioner's power of revocation, it is the growth of custom, and seems to have been first recognized by Congress in the act of July 8, 1870, ch. 225, § 9. (Rev. St., § 4768.)

The Commissioner is and always has been simply directed to pay such and such rates of pension to persons disabled in such and such a manner, or who had such and such a rank. He, or the Secretary of the Interior, or the Secretary of War before him, or the President, devised business methods, one of which obviously suggesting itself was the pension certificate. The moment, however, that a pensioner is found not to come within the terms of the law under which he is being paid, the authority of the Commissioner to pay him his pension *ipso facto* ceases.

There is thus no property right transferred at a given moment, but the pensioner's right to payment is a continuous one, arising ever new with each quarter day, and depending always on the facts of his case. That no property right is passed is evidenced by the fact that Congress can take away the pension at any moment.

In the recent case of *Frisbie* v. *United States* (157 U. S., 160) Mr. Justice Brewer says:

> A pension granted by the Government is a matter of bounty. "No pensioner has a vested legal right to his pension. Pensions are the bounty of the Government, which Congress has the right to give, withhold, distribute, or recall at its discretion. (*Walton* v. *Cotton*, 19 How., 355.)" (*United States* v. *Teller*, 107 U. S., 64, 68.) * * * No man has a legal right to a pension.

There is nothing to the contrary in the very peculiar proviso in the Urgent Deficiency Act of December 21, 1893, ch. 3, as already shown.

Hence the Commissioner of Pensions does not need to go, nor can he go, into a court of equity with a bill to vacate and set aside a pension certificate. If he did so, his bill would be dismissed on the ground that he had an ample remedy at law, or rather without going into court at all; in other words, that no property right had passed, and that he was himself the tribunal to decide the question.

(*f*) The administrative rule against reconsideration in the Pension Office applies only to mistakes which in a law court would be called errors, as distinguished from jurisdictional defects.

Indeed, the Interior Department has always claimed the right to review even for gross error, as in the Coleman case, cited by Mr. Justice Bradley from the Pension Digest, p. 422. The customary test, as expressed by Secretary Noble's special committee in their aforementioned report (p. 5), is "manifest injustice." It will be remembered that "right and justice" are due to the Government, as well as to the pensioner, by the act of 1879.

The Pension Digest is a compilation made in 1885 by order of the Commissioner, to bring the decisions of interest together in convenient form.

The learned justice who first heard this case italicizes a clause under a ruling of Secretary Kirkwood to the effect that reratings shall thereafter be made only "provided the rating therefor was too low" (p. 422), but overlooks a ruling of the same Secretary, following one made by his predecessor, to the following effect (p. 399):

> Where an error of judgment has been made, and a higher rate of pension allowed than that to which the claimant is entitled, the pension should be reduced to its proper rate upon discovery of the error.

By a ruling of Commissioner Black, October 31, 1885 (p. 399):

> Rates of pensions granted under the general law may be *reduced or* increased to conform to the degree of pensionable disability which may be found to exist at the medical examinations, which at any time may be ordered by the Commissioner of Pensions. * * * A vested right in and to the particular sum allowed and paid under the pension certificate does not exist.

By a ruling of December 31, 1886 (p. 398):

> Adjudicated claims may be reconsidered on receipt of additional evidence, *or for other good reasons.*

In the Coleman case Secretary Teller laid down the following rule (p. 435):

> It is an established rule of the Department not to disturb an adjudication of a claim by a former administration except upon the most conclusive evidence that *error* has been committed.

Later than the compilation examined by the learned justice is the series of reports known as "Pension Decisions," instituted by Assistant Secretary Hawkins in 1888 "with a view to establishing a line of consistent precedents in departmental rulings appertaining to the several classifications of pension claims." (Preface to vol. 1.)

In *Tyner's Case* (1 P. D., 21) the former conflicting opinions of the Interior Department and Department of Justice are carefully considered. The rule in the Coleman case is approved and applied against the pensioner.

In *Bone's Case* (2 P. D., 310) the rule is again reconsidered and stated to be that a rehearing will not be allowed "upon a mere matter of opinion as to the weight of evidence, nor upon a matter involving merely an exercise of judgment or discretion; but in order to justify such action glaring error, mistake, or manifest injustice must be made apparent from a review of the record and of the evidence." Applying this rule, the pension under consideration was reduced as "erroneous," being authorized neither by law nor by said departmental decision, and "such an error as could and should be corrected by subsequent action, and for the perpetuation of which the rule of *res adjudicata*, as above defined, can not be invoked." Referring to the acts of 1879 and 1882, Mr. Hawkins says (p. 319):

> Said provisions unquestionably settle the question, in the opinion of the Department, that the rule of *res adjudicata* can not be applied to any question as to the *future status* of and payments to a pensioner, nor to restrict or limit the statutory powers and jurisdiction of the Commissioner to examine, at his discretion, into the merits of any pension case, and to readjust the rate of pension to be received in future by the pensioner in accordance with the result of said investigation, as may be deemed by him commensurate with justice and right.

The same principle was reiterated by Assistant Secretary Bussey in *Mize's Case*, November 14, 1892, (not reported), and by Assistant Secretary Reynolds in *Martin's Case*, 7 P. D., 265; *Beachman's Case*, *Id.*, 249; *Kenney's Case*, *Id.*, 588.

All these decisions, however, relate only to administrative practice in the Department. The various Secretaries and Commissioners were laying down, in somewhat varying form, from time to time, limitations upon their own discretion—limitations to which they voluntarily subjected themselves in the interest of orderly procedure and the greatest good to the greatest number, but which they thus gave the courts no right to enforce. Similar principles have been laid down by the Attorneys-General from the earliest times, but they recognize it to be "a rule of administrative practice." (2 Op., 8; 9 Op., 34; 10 Op., 232, 255; 15 Op., 208, etc.)

(*g*) The condition of total helplessness was jurisdictional. If it was not claimed to exist, then Commissioners Dudley and Tanner had no more jurisdiction to grant a $50 or $72 rating than they would have

had to grant the same rating for the loss of a finger. If, indeed, relator had claimed to be totally helpless, and presented some evidence tending to establish his contention, and if that evidence had been found sufficient by the Commissioner, then the latter's decision, no matter how erroneous, would have been within his jurisdiction, under the principles enounced in the Noble case. Relator, however, never made any such claim. He simply put forward the real facts of his case, and let the Commissioner take the responsibility of breaking the law in his favor. As there was no allegation of jurisdictional facts in any of his papers, hence the rulings of the two Commissioners were absolutely void for all purposes whatever. The pension certificate was a nullity. Every payment of pension moneys thereafter was in part illegal.

The Tanner proceedings were also so irregular in character as to give a right to vacate for that reason.

VIII.

Commissioner Lochren also had the right to examine the relator medically to see whether the disability continued, assuming the rating of 1884 to have been valid when made.

It will be remembered that the absolutely incurable disability—the loss of an arm—was not even claimed to justify a $50 rating. That rating was based solely on the open wound in his left hip, necessitating daily attention. Such a wound is not necessarily incurable. What is its cause and whether there is a remedy is a matter of opinion. There may be no remedy to-day, while a complete cure is discovered by medical science to-morrow. The fact that a disease of this kind has lasted many years is no proof that a possible cure has not existed, although it may have been overlooked. To remind ourselves of this fact we need not hunt through the medical reviews. Proofs are offered us in the advertising columns of the daily papers.

The Commissioner, therefore, finds it his duty to make examinations from time to time. When he shall exercise this duty is a matter within his own discretion. The pensioner must submit to his decision, and the courts have no power to interfere.

Concede for the purposes of argument that the medical examination of 1884 established what Commissioner Dudley (overruling the medical examiners) held it to establish; concede that Commissioner Tanner conclusively adjudicated relator's condition in May, 1889: still he had no jurisdiction to adjudicate what relator's condition would be in May, 1894.

This is so for various reasons.

(*a*) Tanner's issuance of a pension for total helplessness implied no finding one way or the other upon the question of permanency.

Referring back to the two acts hereinbefore printed in parallel columns, it will be perceived that the act of 1874 is an amendment of the act of 1873. The proviso in the earlier act seems applicable to the later:

> *Provided*, That the pension for disability *not permanent*, equivalent in degree to any provided for in this section, shall, *during the continuance* of the disability, in such degree, be at the same rate as that herein provided for a permanent disability of like degree.

Hence the 850 rating of the act of 1874 for total helplessness (and, of course, the 872 rating of the acts of 1880 and 1890 for the same disability) are to be given whether the disability is permanent or not permanent.

(*b*) Assuming, however, as the relator assumes, that this condition of "total helplessness" is to be regarded as a "permanent specific disability" within the meaning of Rev. St., § 4692, the same result follows.

Whatever may be the nature of the disability, the term of the pension is not for life, but for the continuance of the disability, as expressly provided by the last clause of the section:

> Such pension shall commence as hereinafter provided, *and continue during the existence of the disability.*

Reference to the early statutes collected in Mayo and Moulton's Digest shows that this is no new or accidental provision, but that from the earliest times disability pensions have never been made permanent during life, but always authorized so long as the disability may continue. (Acts of March 23, 1792, ch. 11[illegible]; February 21, 1795, ch. 265; April 10, 1796, ch. 25, etc.)

Of course, the pension during the continuance of the disability is equivalent to a pension for life in case of the absolute loss of part of the body, like a limb or an eye. There is no express exception in the statute providing for such cases, for the very reason that the statute gives life pensions in these instances by its own necessary implication.

(*c*) This contingent aspect of the term of a disability pension has always been recognized by the statutes. They have always recognized to some extent, though never expressly granted in general terms, the right of the Commissioner, derived, doubtless, from directions of the President, dating from Washington's Administration itself, to examine from time to time, and continue, increase, or reduce as the pensioner's condition might require. Formerly, except in cases such as the loss of a limb, such examinations were required to be held every two years.

The act of March 3, 1819, ch. 81, which first established this biennial examination, contained the following proviso:

> *Provided*, That where the pension shall have been originally granted for a total disability in consequence of the loss of a limb or other cause which can not either in whole or in part be removed, the above [surgeon's] certificate shall not be necessary to entitle the applicant to payment.

Revised Statutes, §4771, continuing the biennial examinations, contained nearly the same clause, although not in the form of a proviso:

> Where the pension was originally granted for a disability in consequence of the loss of a limb or other essential portion of

> the body, or for other cause which can not either in whole or in part be removed * * * the above [surgeon's] certificate shall not be necessary to entitle the pensioner to a pension.

This section, following the act of March 3, 1873, ch. 234, § 34, also contains in the place where stars are above inserted the following words:

> Or where a disability is certified by competent examining surgeons, to the satisfaction of the Commissioner of Pensions, to have become permanent in a degree equal to the whole rate of pension.

The whole section was repealed by the act of June 21, 1879, ch. 34, which enacted (§ 3) that the Commissioner "shall have the same power as heretofore to increase *or reduce* the pension in accordance with right and justice." No power to reduce was ever expressly given, so that this refers to the general practice above described.

The present law, therefore, does not require a biennial examination, but leaves the whole matter to the discretion of the Commissioner.

A question very analogous was raised under the general Revolutionary dependent pension act of March 18, 1818, ch. 305. This act provided that every member of any of certain classes of Revolutionary veterans, "who is, or hereafter by reason of his reduced circumstances in life shall be, in need of assistance from his country for support, and shall have substantiated his claim to a pension in the manner hereinafter directed, shall receive a pension from the United States, if an officer, of twenty dollars per month *for life*," etc. There was no power of revocation given in the act, or in any general law. Nevertheless, Attorney-General Taney advised the Secretary of War that in case of improvement in the pensioner's circumstances his name could be stricken from the roll, since "the foundation on which the pension is given fails;" and since otherwise "a person who by descent or devise, or any other way had become wealthy and affluent might be receiving the bounty of the public." (2 Op., 502.)

(*d*) It is therefore unnecessary to struggle with the definitions of "total" and "permanent specific" in various sections of the Revised Statutes. Very little comment will, therefore, be made upon them by the undersigned, and the comments here made are not intended to express any departmental construction.

It is not essential to assume that the meaning of the words "permanent specific" is the same in § 4692 and § 4698½, although this assumption has been made not only by Mr. Justice Bradley, but by justices and executive officers in earlier times. The Revised Statutes are not absolutely consistent in nomenclature. For instance, it has recently been pointed out in an opinion of the Attorney-General that the word "merchandise" has at least three different meanings in that portion of the revision which concerns the collection of customs duties (21 Op., 94). Words were used by different Congresses in different senses, and the

revisers did not always succeed in reconciling the different uses. The same may be said of the special pension revision of March 3, 1873.

§ 4692 is evidently intended to cover all possible disabilities. The word "total" in that section has a very technical meaning. In the case of private soldiers like this relator, it involves a pension of $8 per month. (§ 4695.) When our civil war pension system was established in 1862 the "total" and "inferior" were the only classes recognized. The former was an inheritance from earlier statutes dating as far back at least as 1819, as may be seen by an examination of Mayo and Moulton's Digest. This digest contains a definition of the word in the shape of an opinion by Gen. Peter B. Porter, as Secretary of War, in 1828. The importance of the word has largely been lost by acts subsequent to 1862 providing special rates for most of the disabilities then recognized as "total." It might be said that a pension like that of this relator is granted for an "inferior" disability accompanied by specially aggravated conditions. This would be contrary to the definition recognized by the courts in the case of Gen. Ward B. Burnett. (*Burnett* v. *United States*, 20 Ct. Cls., 190; affirmed 116 U. S., 128.)

Let us concede, for the purposes of argument, that the phrase "permanent specific" in § 4692 covers this pensioner's case.

Is, however, the same meaning to be given in § 4698½? This, as we have said, is not necessarily so. It has, in fact, been the subject of a difference of opinion.

Mr. Justice Bradley considers it clear, relying upon certain extracts from the Pension Digest of 1885. It would appear that he did not personally examine the Digest, but relied on extracts taken by others, for the very sentence next preceding one of those which he quotes is as follows:

> A disability which requires a medical examination to determine its nature is *not* specific.

The word *not* is italicized in the original. The reference given is to Attorney-General Devens' opinion of May 17, 1879, in the *Hutchinson Case* (16 Op., 330, 335), which states the question and answer as follows:

> Upon this state of facts you suggest two inquiries: 1st. "Does incapacity to perform manual labor, arising from causes like the above-mentioned [injury to muscles of the arm], constitute a specific disability within the meaning of § 4698½ of the Revised Statutes?"
>
> * * * * * *
>
> I think the disabilities which are to be deemed "specific" are those *specified* in the above-cited statutes, such as the loss of a hand, foot, or eye. Injuries like those sustained by Mr. Hutchinson, requiring medical examination to ascertain and declare their nature and extent, and as to the effect of which there is room for difference of opinion, I do not consider "specific" disabilities.

Two years later, in the case of Gen. Ward B. Burnett, a pensioner under a special act, Attorney-General Brewster, apparently in igno-

rance of General Devens' opinion, made a contrary ruling. (17 Op., 327; 18 Op., 73; see also 17 Op., 401, 18 Op., 39, and *United States* v. *Teller*, 107 U. S., 64.)

The Pension Office has followed the Devens definition (*Miller's Case*, 4 P. D., 351, 352; *Caton's Case*, 6 P. D., 159, 164), although the definition practically recognizes a fourth class of pensions, besides those named in Rev. St., § 4692.

Whatever may be the correct view on this point, it is settled for the purposes of the present case, if the learned justice's position as to *res adjudicata* is correct; for in 1884 relator's claim to arrearages was overruled on the express ground that his disability was not a "permanent specific" one under § 4698½ (p. 16). It is true that this is denied by the "replication," but the motion to quash admitted the allegations of the return to be true; and as a matter of fact they are shown to be true by the records of the Pension Office.

The statutes do not, therefore, subject the Commissioner of Pensions to the extraordinary position of being unable to lift a finger in defense of the United States Treasury, no matter how evident and complete may be the recovery of a man lately totally helpless, though the finding of helplessness is based upon the report of some medical man personally unknown to the Commissioner, and whose degree of skill is evidenced by his willingness to accept a fee of not over $2 for each man examined. (Pension appropriation acts of 1890 and 1895.)

Rating a case of helplessness as "permanent" does not mean that it is incurable. To give it such a narrow meaning would be a great misfortune to pensioners, and would cut off many pensions. The word "permanent" is used in the Pension Bureau very much as it is used in the parlance of innkeepers, who distinguish "permanents" from "transients" among their guests. A pensionable injury is called "permanent" when it will probably last for an indefinite future time, and may last always—if it is chronic. Pensions for total helplessness are sometimes granted, taken away, and restored again, as the veteran's condition varies. (*Gaw's Case*, 3 P. D., 231.) This, as above shown, is justified by a proviso in the act of 1873.

IX.

It was therefore relator's duty to supply evidence of his present condition; and for failure to do so, his pension may be reduced.

Failure to answer a request for present medical testimony may properly be regarded as a confession of error.

The court here relied partly on the form of notice, construing it as based only on the theory of illegality. It is submitted that this is too technical a construction. Such notices are not to be construed like common law pleadings. It should be sufficient if they convey information of what is needed.

Mr. Justice Cox seems to have considered the notice of January 4, 1894, sufficient in this respect. The notice now to be examined is that

of March 16, 1894 (pp. 6, 7). It clearly contains two charges: First, that the pensioner never was entitled to the $72 rating; second, that he is not now entitled to it. It offers an opportunity to file "such further evidence in support of your right to pension at the rate you are now receiving * * * as you may desire to present."

It is respectfully submitted that the conduct of this relator, in picking flaws in the notice instead of complying with its offer, was contumacious and not to be encouraged by the courts.

Moreover it is doubtful whether any notice is necessary under the act of 1893 when the pension is void *ab initio;* and it will be remembered that relator was already very familiar with all the questions raised, having had two litigations with the Pension Office about them.

X.

Commissioner Lochren had also the right to rehear, because there was new evidence, namely, the information as to relator's full ability to perform the duties of a Supreme Court Judge.

This is alleged in the return not to have been before Commissioner Tanner (p. 13). The allegations of the return are admitted, as we have stated. It is therefore immaterial that the "replication" denied this allegation. Mr. Justice Bradley sees fit to cast a slur upon it and intimate a disbelief in its correctness. It is submitted that he should have taken without comments the facts admitted by the motion to quash; and it is submitted that his failure to do so gives us the right, in justice to the Commissioner who made the return, to give the authority for this statement, which is no other than the oath of relator himself, who, in his verified bill in the injunction suit, made the following allegation: That the "evidence upon which the said defendant acted and passed in suspending your orator's pension was the same in every respect as that acted and passed upon by James Tanner, Commissioner of Pensions, in issuing the said pension certificate of August 16, 1889, and that the only *additional proof* considered by defendant was information showing the wholly immaterial fact that since the year 1887 your orator has been one of the justices of the supreme court of Michigan, and has performed the duties and drawn the salary of that office."

Mr. Justice Bradley also considers that this is immaterial, as merely cumulative evidence, since relator had been a lawyer before he was a judge. There is, however, absolutely no evidence of his capacity to support himself in 1884 except that he was then a law partner of one George R. Gold (p. 28). Nothing in Gold's affidavit tends to show whether or not relator was fit for active practice. Many invalid members of law firms do very little work and get very little share of profit. It appears that relator was then often sick and away. The new fact, not contained in the Dudley record (upon which record alone Tanner acted), was that he was "in the active performance of his duties" as judge in 1889 and in 1894.

XI.

Relator was estopped to deny that a case could be reheard by the Commissioner upon the same evidence.

His claim was denied by Commissioner Dudley in two respects—he was denied arrearages under Rev. St., § 4698½; and he was denied the $72 rating, doubtless on the principle of the Dunlap and Miller cases, described in *Dunlap* v. *Black* (128 U. S., 40), and *Miller* v. *Raum* (135 U. S., 200).

He at once claimed a right to be reheard on the former question, abandoning the latter (p. 35). The learned justice below seems to regard this letter as preserving his rights. We do not understand how a litigant can preserve his rights by writing a letter to the judge. However, let this pass. He wrote the letter and claimed that a decision on a pension case was not *res adjudicata*.

On May 6, 1889, he applied for a rehearing *on the same papers* (p. 17), and the rehearing was granted, not on the ground that Mr. Dudley had exceeded his authority, but on the ground *of error* (p. 35). And his application was not made simply on the point as to which, according to Mr. Justice Bradley, he had "reserved the right to apply to reopen" (p. 56), but on the other point, *which he had made and abandoned* (pp. 29, 35). His application was successful, and he received not only arrearages of the $50 rating but the $72 rating, with full arrearages of that, too (pp. 17, 18).

Even this did not satisfy the relator, who found that there were more claims which he had forgotten to raise, and on a new application and a new certificate he obtained, on August 16, 1889, arrearages from June 6, 1866, to June 4, 1874, at rates which he had never before laid claim to (p. 18).

Mr. Justice Cox states the proposition as unquestionable, that if Mr. Tanner had the power to review Mr. Dudley, Judge Lochren has the power to review Mr. Tanner. By applying successfully to Mr. Tanner, relator conceded the rights now claimed by Judge Lochren. The Court of Appeals sustains the point (p. 70).

There can be only one other position possible to take, and that is *that departmental decisions are decisive as against the Government, but never against the claimant.* This is precisely the position which Mr. Justice Bradley takes. He says (p. 55):

> On his application, and with the assent of the Commissioner, it was reopened in 1889.

And the justice states the law of *res adjudicata* as applied to departmental action by Pension Office decisions, as follows (p. 55):

> A rating shall stand unless it ought to be modified *in the interest and at the request of the petitioner and* to do him justice.

It is believed that never before, except in the ruling of October 14, 1881, quoted by the learned justice, has such an astounding proposition been put forward. On the contrary, the rule is applied as much to

claims rejected as to claims admitted. (*State of Illinois* v. *United States*, 20 Ct. Cl., 342, 349, and auth. cit.; see also 17 Op., 315; 19 Op., 439; *Real Estate Savings Bank* v. *United States*, 16 Ct. Cl., 335, 350; *Jackson* v. *United States*, 19 *id.*, 504; *Waddell* v. *United States*, 25 *id.*, 323, 327; *Armstrong* v. *United States*, 29 *id.*, 148.)

In considering these claims cases two things are to be borne in mind: First, that they are cases where the two departmental decisions each concerned the same sum of money or the same piece of property; second, that the first decision is not alleged to have been void for lack of jurisdiction.

Commissioner Tanner's decision, so far as it concerned the arrearages from 1874 to 1884, violated both of the principles laid down in these cases: First, he awarded the precise sums of money which had been asked of Commissioner Dudley and refused; second, it was admitted that Mr. Dudley had jurisdiction in the premises, and only claimed that he erred in judgment.

Commissioner Lochren, however, violates neither principle; he merely refuses to apply the same ruling to new sums of money, as in the McDaniel case; and his action is based on lack of jurisdiction by his predecessors.

Yet the learned justice says that Commissioner Tanner was right and Commissioner Dudley was wrong; and, as against the authorities above cited and many rulings of the Pension Office itself, relies on the authority of a single ruling, on its face merely a limitation imposed by the Commissioner upon his own discretion.

XII.

The court can not consider the allegations of the petition as to relator's present condition.

This follows from the foregoing argument. As the Commissioner has the right to examine from time to time with medical assistance, he is not obliged to take in lieu thereof the pensioner's *ex parte* statement, though it be under oath. Indeed, he would be guilty of a breach of duty if he took it. He can not, therefore, act on this petition. Nor can a court receive evidence which the Commissioner could not receive.

XIII.

It is also suggested that the act of 1892 did not apply to this case, and that the pension, if reduced at all, should have been reduced to $36 *per* month. If so, relator can hardly complain.

As to the political matter injected into appellant's brief we shall say nothing here, nor even criticize the propriety of language whose use a judge of the highest court of a State sees fit to authorize.

It is respectfully submitted that the order should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

APPENDIX.

Opinion of Mr. Justice Cox in Long v. Lochren.

The material allegations of the bill may be stated as follows, viz:

On the 8th of August, 1861, the claimant enlisted in the volunteer service of the United States as a private in Company A, Eighth Regiment of the Michigan Infantry, and served until April 16, 1862, when, at the battle of Wilmington Island, Georgia, he received a gunshot wound in his left arm above the elbow, which resulted in the amputation of his arm just below the shoulder. At the same time a ball passed through his hip bones and lodged in the groin, where it still is.

This wound has never healed, and remains a running sore to this day, and requires dressing twice daily, and he is wholly incapacitated for the performance of manual labor, and, as far as that is concerned, he is permanently and totally helpless, requiring the regular aid and attendance of another person.

On the 28th of February, 1863, he was placed on the pension rolls, and prior to August 16, 1889, he was paid at the following rate, viz, $8 a month from June 23, 1862; $15 a month from June 8, 1866; $18 a month from June 4, 1872; $24 a month from June 4, 1874; $30 a month from March 3, 1883; $50 a month from March 21, 1884.

On the 16th of August, 1889, a new certificate was issued to him by Commissioner Tanner, changing the rates before mentioned, and particularly in this, and that he allowed $50 per month from *June 4, 1874*, and *$72* per month from *June 17, 1878*, and this was expressed to be for "loss of arm above elbow and gunshot wound of left hip." From that time he regularly received his pension at the last-named rate, including arrearages.

On the 4th of January, 1894, he received a notice from the present Commissioner "that it appears from medical evidence on file in this Bureau that you are not disabled from the effects of loss of left arm above the elbow and gunshot wound of left hip in such degree as to require the constant personal aid and attendance of another person, so as to entitle you to $72 a month, the rate of pension you are now receiving. * * * Said rate will, therefore, be reduced to $50 a month, unless satisfactory evidence be furnished to show that you are so disabled from the pensioned causes alone as to require the regular and constant personal aid and attendance of another person. Under the provisions of the act of Congress of December 21, 1893, you may, if you believe that the disability entitles you to the rate of $72 per month, within thirty days from this date, file in this Bureau competent proof (medical if practicable) to that effect. Your case will thereupon be reconsidered, and if the testimony filed warrants such action, your present rate will be allowed to remain unchanged. If, however, such evidence shall not be satisfactory, or shall not have been furnished, said reduction will be made without further notice."

On July 23, 1893, the Commissioner had issued an order to the pension agent at Detroit to suspend payment of complainant's pension pending a special examination, and on August 28 he notified complainant to report to the board of examining surgeons at Detroit. The complainant applied to the Commissioner, without effect, to revoke this order; and on the 4th of October he applied to this court for a mandamus to compel the Commissioner to comply with his request, and a rule to show cause was issued, to which the defendant filed an answer. While the case was under advisement the act of December 21, 189[illegible] was passed, requiring thirty days' notice to be given and a hearing upon evidence before a pension should be suspended, and thereupon defendant directed payment of pension to be resumed, and so advised the court.

The court afterwards delivered an opinion, a copy of which was filed as an exhibit. It is alleged that the defendant acted upon the identical proofs which were before Commissioner Tanner, and no new evidence, and did not give the complainant a hearing; that besides the evidence on file, Commissioner Tanner made personal inspection of complainant's wounds, and he had before him a number of affidavits in addition to those exhibited with defendant's answer in the mandamus case.

Upon the disposal of the mandamus case the defendant issued the notice of January 4, and, unless restrained by the court, complainant believes he will proceed to reduce his pension according to that notice. His right to do so is denied and an injunction asked.

It is unnecessary to refer to the answer in detail. It refers to and adopts the answer in the mandamus proceedings which gives a history of complainant's several applications, and the action thereon; it supplies copies of all the affidavits upon which Commissioner Tanner acted in giving to complainant his present pension certificate, and it denies the legality of his action.

The grounds of defense to the present application will more fully appear as I proceed the discuss the questions of law involved in the case.

It is important, in the first place, to ascertain, accurately, the history of the complainant's claim for pension, inasmuch as counsel disagree as to the character of his application and as to the effect of the action upon them by the office.

The first declaration of the complainant was made on the 16th of July, 1862, and he then described his injury as follows, viz: "His left arm amputated near the shoulder and another wound in the abdomen which is still unhealed and the ball not extracted."

The only act of Congress then in force on the subject of pensions for disabilities incurred in the then pending war was that of July 14, 1862, ch. 166, passed two days before this declaration. This provided for any soldier, etc., disabled by reason of wounds received in the military service since March 4, 1861; and allowed for privates, for the highest rate of disability, the sum of $8 per month, and a proportionate rate for an inferior disability.

It did not establish any specific disability as the result of one or another kind of wound, but seems to have left the gravity of the injury to be determined by the pension officials.

The complainant made no separate claim on account of his two wounds; he made no claim on the ground of incapacity to perform manual labor or because he required the aid and assistance of a third person, and submitted no evidence on either head, for at that time no such grounds of claim had been indicated in the law, but he simply

stated his condition as resulting from his double injury, and he was allowed thereafter the highest rate of pension then provided, viz, $8 per month. At that time, too, only three months after the wound, it would not have been possible to certify that the hip wound would be a permanent injury.

The act of June 6, 1866, ch. 106, provided for different classes of sufferers different rates of pensions, as follows, viz:

1. (*a*) For those who had lost *both eyes* or *both hands*, and (*b*) those *otherwise so permanently and totally disabled as to render them utterly helpless*, or (*c*) so nearly so as to require the constant personal aid and attendance of another person, *twenty-five dollars* ($25) per month.

2. (*a*) For those who had lost *both feet*, or (*b*) *one hand and one foot*, or (*c*) otherwise *so disabled as to be incapacitated from performing manual labor, but not so much so as to require constant personal* aid and attendance, twenty dollars ($20) per month.

3. For those who had suffered the loss of *one hand or one foot*, or had been permanently disabled in the same, *fifteen* dollars ($15) per month.

Although this act provided for those who, in consequence of wounds, were either utterly helpless or so nearly so as to require constant attendance, and also for those who, while not requiring such attendance, were incapacitated from performing manual labor, the complainant made no claim for increase of pension on either ground, but on the 31st of July, 1866, applied only to have his pension increased to $15 per month, which was the allowance for the loss of one hand, and which was duly allowed. This is entirely inconsistent with the idea that he was then claiming the larger allowance for the other designated disabilities.

The act of June 8, 1872, ch. 342, made some changes in the specification of disabilities and the rates of pension. It allowed:

1. (*a*) For those who had suffered the loss of the sight of both eyes or of *both hands* or *both feet*, or (*b*) were otherwise so permanently and totally disabled as to render them utterly helpless, or (*c*) so nearly so as to require the constant personal aid and attendance of another person, *thirty-one and twenty-five one-hundredths dollars* ($31.25).

2. (*a*) Those who had suffered the loss of *one hand* and *one foot*, or (*b*) were otherwise so disabled as to be incapable of performing any manual labor, but not so much so as to require constant personal *aid and attendance, twenty-four dollars* ($24) per month.

3. (*a*) For those who had suffered the loss of *one hand* or *one foot*, or (*b*) were otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot, eighteen dollars ($18) per month.

Although total helplessness, or such a degree of it as to require regular aid and attendance, and incapacity to perform manual labor without the necessity of aid and attendance were all provided for in this act at increased rates, the complainant did not apply for such increase on any one of these grounds, but on the 10th of August, 1872, asked an increase of $3 per month, making his pension $18 per month, which was the increased allowance only for the loss of one hand. This would certainly seem to negative any claim or pretension to relief on the other grounds.

An act of March 3, 1873, ch. 234, increased the rates given by the foregoing act. For total helplessness, or *the condition* so near it as to require personal aid and attendance, it gave $25 per month from June 4, 1864, to June 3, 1872, and thenceforward $31.25; and for incapacity to perform manual labor, not requiring personal aid and attendance, it

gave $20 from June 4, 1864, to June 3, 1872, and thereafter $24 per month. Yet, although the complainant was only receiving $18 per month, he made no application for increase under this act.

The act of June 18, 1874, ch. 299, allowed all persons who were then entitled to pensions under existing laws, and who had lost either *an arm* at *or above the elbow* or a leg at or above the knee, *to be rated in the second class*, and receive *twenty-four dollars* per month. On the 29th of August, 1874, the complainant applied for an increase of his pension under this law, to $24 per month, which was allowed.

The act of June 18, 1874, ch. 298, increased the allowance for permanent, total helplessness, requiring the personal aid and attendance of another person, to $50 per month. The complainant made no application for increase under this law.

The act of June 16, 1880, ch. 236, increased the allowance of those who were receiving pensions under the last act to $72 per month.

On the 15th of August, 1881, the complainant applied for an increase of pension. He says "*he is a pensioner by reason of loss of arm above elbow;* that he believed himself entitled to an increase of pension on account of gunshot wound of left hip. * * * Said wound has never healed and requires bandaging and dressing every day, and has been, every day since it was received, discharging, freqently to such an extent as to stain through dressing and bandage and clothing, and causing shrinkage of hip and at times much lameness and soreness of hip."

This was the first time that he had made any separate claim for this particular injury. He did not state under what act he claimed, or that the injury incapacitated him from manual labor or rendered him helpless to a degree requiring the aid and attendance of a third person. And as it came within no specific provision of the statutes for increasing his pension beyond $24 per month, which he was then receiving, the Commissioner could do nothing else than reject the claim. One of the two affidavits filed by him did indeed state that in the opinion of the affiant, a physician, he was incapable of performing manual labor. But that alone, under the latest act then in force relating to that disability, that of March 3, 1873, would not entitle him to more than $20 per month.

The act of March 3, 1883, chapter 91, gave to all persons then on the pension rolls who shall have *lost an arm at or above the elbow*, or a leg at or above the knee, or who shall have been otherwise so disabled as to *be incapacitated to perform manual labor*, but not so much so as to require regular aid and attendance, $30 per month.

On March 21, 1883, the complainant applied for a new certificate *under the new act*, under which he said he was advised he was entitled to $30 per month.

As he made no new declaration, it is to be taken for granted that an increase was asked for the loss of arm, for which he had already been advanced several times, and of which, therefore, no new proof was necessary.

On the 13th of March, 1884, which was sixteen years after the first act of Congress (June 6, 1866) providing for the condition *of helplessness, requiring aid and attendance* and that of *incapacity to perform manual labor*, the complainant, for the first time, applied for an increase on the ground that he *required aid in taking care of his hip wound.*

In a letter to Phil W. Coleman, medical examiner, he says he can show what "will entitle him to an additional $20, or possibly $42," which would make his pension $50 or $72, under the acts of 1874 and 1880. He admits that his proofs theretofore filed did not disclose his

need of aid and attendance. He does not speak of his incapacity to perform manual labor, but he files affidavits of physicians apparently establishing that.

His letter was submitted to the Commissioner, and examination by the examining surgeons was made on the 21st of March. The medical referee expressed a doubt to the Commissioner (Dudley) whether the case came within the intent of the act of June 18, 1874. Nevertheless, the Commissioner allowed a reissue of his certificate for $50 per month from March 21, 1884.

This was a decision that complainant was entitled to $50 per month only, notwithstanding his claim that he might be entitled to $72, and this the complainant acquiesced in. But he protested against dating the allowance from March 21, 1884, only, claiming that it ought to be from June 18, 1874, the date of the act by which that rate was provided, or, at least, from 1881, when he claimed an increase as before mentioned.

The papers do not show any further declaration or formal claim for increase by complainant; but on the 6th of May, 1889, Commissioner Tanner reversed the ruling of Commissioner Dudley and directed a reissue, changing the *date of commencement of increase from March 21, 1884, to June 4, 1874*, and, further, that complainant be accorded the full benefit of any subsequent act of Congress that might cover his case.

The significance of this last direction I understand, from the argument of complainant's counsel, to be this: The act of *June 16, 1880*, gives to soldiers and sailors "*who are now receiving* a pension of *fifty* dollars" under the act of June 18, 1874, an increased pension of $72, in lieu of the other. Of course, this act could not literally apply to the complainant, who did not receive the $50 pension before 1884, but Commissioner Tanner, having dated back the increase to $50 to 1874, decided that the pensioner should be held as constructively receiving it when the act of 1880 was passed; and he thereupon issued a new certificate for $72 per month from June 17, 1878, under the act of 1880.

This rate of pension the complainant was receiving when his pension was suspended, as set forth in his bill, by the present Commissioner.

It is impossible to do justice to this case without considering the legal merits of the complainant's claim to the rate of pension he is now receiving.

That rate is claimed under the provisions of the acts of June 18, 1874, and June 16, 1880, which are silent on the subject of incapacity to perform manual labor, and provide exclusively for certain specified disabilities, such as loss of hands, feet, or eyes, and then generally for any injury resulting in total and permanent helplessness requiring the aid and attendance of a third person.

The complainant's contention is that, on a fair construction of all the acts, his incapacity to perform manual labor is the real test of his right to the highest rate. His case, as stated in the bill, is "that ever since he received his said wounds he has been and still is wholly incapacitated for the performance of manual labor, and that, *as far as the performance of manual labor is concerned*, his said wounds and injuries, from the day they were received, resulted in permanent, total helplessness, requiring the regular personal aid and attendance of another person."

It is not perceived what difference there is between helplessness, *as far as the performance of manual labor is concerned*, and simple incapacity to perform manual labor. They are one and the same thing. So that this incapacity is the real ground of the claim.

Upon an inspection of the several acts of Congress we find that before 1874 the highest rates established were by the act of March 3, 1873. That provided for several classes, as follows:

1. For those so disabled as to be incapacitated for the performance of any manual labor, but not so much so as to require regular personal aid and attention, *twenty dollars* per month.

2. For those so totally and permanently disabled as to render them *utterly helpless*, or so nearly as to require personal aid and attendance of another person, *twenty-five dollars* per month.

This law clearly distinguishes between the mere incapacity to perform manual labor and the condition of helplessness, for it provides different rates of pension for the two conditions. And it is obvious that there is a difference between the two disabilities. By manual labor we understand the labor by which an artisan or ordinary laborer earns his subsistence. A man, in consequence of a stiffened joint or wounded muscle, or rheumatism, or other enfeebling disease, contracted in the military service, may be unable to perform manual labor and yet in other respects be perfectly self-helpful, need no aid or attendance, and be able to earn his own subsistence.

In the act of June 18, 1874, Congress made a large advance in the *rates*, but the act was more restricted as to the person to be benefited. Before that persons who were not *utterly* helpless, but only so nearly so as to need the aid and attendance of a third person, were allowed $25 per month. In the new act this class of persons were not included, but while the *rate* was *doubled*, the relief was confined to persons who were *totally* and permanently helpless.

It appears from the Congressional Record that this was *de industria*, for the bill as reported was in the form of the act of 1873, and was amended in the particular named. And, to make it more emphatic, a proviso was added forbidding the increase of pension *unless the injuries have resulted in permanent total helplessness, requiring the regular personal aid and attendance of a third person.*

By the act of 1880 again, this rate, for the same class of persons then receiving the $50, was increased to $72 per month.

As the law stood after 1880, then, the allowance was—

1. For those incapacitated for the performance of manual labor, but not so much so as to require regular personal aid and attention, per month, $20.

2. For those so *nearly utterly helpless* as to require personal aid and attendance of another person, $25.

3. For those *totally* and *permanently helpless*, requiring the personal aid and attendance of another person, $72.

It will be observed that the allowance for total helplessness is more than three times that given for mere incapacity for manual labor, and nearly three times that given for a condition *near total helplessness*. It would seem, then, impossible to treat the helplessness, intended to be provided for, as in any sense identical with the mere incapacity for manual labor.

There is no such case as the complainant describes his own to be, *i. e., permanent total helplessness, as far as the performance of manual labor is concerned*, requiring the regular personal aid, etc., which is provided for in any statute.

The statutes under which he claims confined the rate of pension he is receiving, in the most mandatory language, to cases of unqualified *total* permanent helplessness. The statute which comes nearest to complainant's case, if it does not completely describe it, is the act of July 14,

1892, which gives $50 per month to those who are shown to be *totally incapacitated for performing manual labor*, and who are disabled to such degree as to require frequent and periodical, though not regular and constant, personal aid and attendance of another person.

And now the question arises, what is meant by helplessness? If the language of the statutes is to be interpreted in its natural sense, and is not used merely figuratively or rhetorically, a helpless man is one who can not help or defend himself. (*See* Webster's Dictionary.) Of course it has different degrees, but *total* helplessness is the highest degree, which can hardly be predicated of anyone but a paralytic. Some idea of the meaning of the act of 1874 may be gathered from the description of the specific injuries provided for in the same act. A man without eyes must see with the eyes of others. A man without hands must do any and all kinds of work with the hands of others. A man without feet must be moved about by others. But even these cases do not amount to total helplessness, the forms of which it is difficult or impossible to specify. A man totally helpless is one who can not help himself in any of the ordinary functions, duties, or occupations of life; especially one who is incapable of earning his subsistence. Such was the opinion of Assistant Secretary Reynolds addressed to the Commissioner of Pensions December 7, 1893, and such of Secretary Chandler (Digest of Pension Laws and Decisions, p. 202).

Furthermore, the condition of helplessness must be such as to require the regular personal aid and attendance of another person. Aid required in consequence of helplessness must be aid in those very respects in which the party is helpless, and where he is totally helpless it must be aid equally extensive. It seems to be assumed that mere attendance for medical treatment, such as the frequent dressing of the wound, meets the requirements of the statute. If this can be considered aid at all, in the sense of the statute, it is certainly not the aid required by the totally helpless man. And no evidence appears to have been filed to show the complainant's need of any other aid.

It appears from the complainant's affidavit, filed in support of his claim, that he entered the law office of Mr. Sumner Howard, one of the affiants, in 1863, and continued there until January 1, 1865. In 1866 he was clerk of the circuit court of Genesee County. In 1870 he became a partner of Howard, and continued to practice law with him to 1876. And it now appears that since 1887 he has been a judge of the supreme court of Michigan, earning a good salary.

Taking the terms "totally helpless" in the ordinary sense, it is impossible to predicate them of the complainant either now or as of the year 1889 or as of 1884. In his application in 1884 he explains his failure to apply before for an increase of pension by saying, "I had understood, until quite lately, that the showing must be made that I could *not get around without assistance*. Of course, I could not make such proof as that. As I now understand the act, if I can show that I *need assistance in dressing the wound and taking care of that*, then *my claim will be made out*."

The examining surgeons found him well nourished, assimilation good, pulse, respiration, and temperature normal, but say "it is *convenient* for him to get aid and attendance to dress his wounds." And they found the disability to entitle him to a second-grade rating.

The medical referee expressed a doubt to the Commissioner (Dudley) whether the case came within the act of June 18, 1874.

Nevertheless, the Commissioner ordered a new certificate to issue for the first grade—$50.

It seems to me so plain, on the complainant's own showing, that his case did not come within the act of 1874, that I think the action of the Commissioner was erroneous and improvident. It is hardly necessary to add that, in my judgment, that of Commissioner Tanner was still more so.

But the principal contention on the part of the complainant is, that Commissioner Tanner having, in the proper exercise of his official authority, decided the complainant to be within the acts of Congress of 1874 and 1880 and therefore entitled to a pension of $72 per month, his decision is final and conclusive, and can not be reviewed and reversed by his successor.

It becomes necessary to consider somewhat more particularly the nature of Commissioner Tanner's rulings.

As before mentioned, the complainant submitted his claim in 1884 for an increase of pension to $50 or $72.

The Commissioner allowed $50, and thus impliedly rejected the claim to $72. He could not have done otherwise if he adhered to the letter of the act of 1880, which raised to $72 only the pension of those who were *then* receiving $50 per month. The most liberal construction of the law could not extend it beyond the letter farther than to those who were then applying for the $50 increase, and were afterward shown to be entitled to it, and certainly not to those who had never even applied for it. So held in Hopkins's case. (*See* Digest, etc., 253.)

But whether that be so or not, Commissioner Dudley had the clear right so to interpret the law.

In the case of United States *rel.* Dunlap *v.* Black (128 U. S., 41) it appeared that the relator had not, although fully entitled to the benefits of the act of 1874, made application to be rated accordingly until after the passage of the act of 1880. He then applied to the Commissioner (Black) for just such a certificate as the complainant received from Commissioner Tanner, i. e., one giving him $25 per month from June 6, 1866; $31.25 from June, 1872; $50 from June 4, 1874, and $72 per month, under the act of 1880, from June 17, 1878.

The Commissioner refused on the very ground that when the act of 1880 was passed Dunlap was not then receiving $50 per month under the act of 1874, although he would have been entitled, on account of his condition, if he had applied for it, but he had never applied to be rated higher than $36.

A mandamus was applied for to this court and refused; and the Supreme Court affirmed our action, saying: "Whether, if the law were properly before us for consideration, we should be of the same opinion or of a different opinion is of no consequence in the decision of this case. We have no appellate power over the Commissioner and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions."

Another thing decided by Commissioner Dudley was that the new rating should commence from March 21, 1884, only, the date of the examining surgeon's certificate, instead of from 1874, the date of the act allowing the increase to $50, as claimed by Judge Long.

In the answer in the mandamus case, adopted in the present case, and both under oath, it is said that this was ruled under section 4698½, Revised Statutes of the United States, which provides that "except in cases of permanent specific disability no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the pending claim for increase."

I understand a specific disability to be one specifically described, like the loss of a hand or foot, and not one described generally as an injury resulting in total helplessness. The Commissioner was, then, justified in holding this of the complainant's to be not a specific disability. At all events, he had the right so to determine in the exercise of his official judgment.

Now, this decision was reviewed and distinctly overruled on both these points by Commissioner Tanner. He says: "He (the claimant) claims that *by reason of error in the adjudication of his case* (i. e., by Dudley) he is entitled to said increase."

And thereupon the Commissioner directs that a reissue be made to change the date of the commencement of increase. And as a further consequence of this change the Commissioner treats him as if he had been receiving this increase at the date of the act of 1880, on the ground that he was then entitled to it, although he had not applied for it, and increased his pension to $72 per month.

This review of Commissioner Dudley was made without any additional evidence as to complainant's condition. The latter says, indeed, that Commissioner Tanner made a personal inspection of his wound. By the regulations of the office, as to proof, which have the effect of law, section 4696, Revised Statutes United States, the evidence to support a claim must be either of record or be verified by oath before a proper officer, and it must, as a rule, be medical testimony, as to the nature of a disability (pp. 124, 125, 129, Pamphlet Laws and Regulations), and no authority is given a Commissioner to decide *upon his inspection*. Nor does it appear, nor is it alleged, that the inspection disclosed anything in addition to the written testimony.

Now, if one Commissioner has no authority to review the action of his predecessor, then the action of Commissioner Tanner was *ultra vires*, and the present Commissioner has a right to treat it as a nullity. If, on the other hand, Commissioner Tanner's review and reversal of Commissioner Dudley's action was legal, the same right of review of his own proceedings resides in the present Commissioner.

Another important question presents itself. While it is true that every Commissioner has the *jurisdiction* to construe the law under which he acts, and determine upon evidence whether a given case falls within it, yet he can not read every plain and essential feature and condition out of the law, or entertain a claim which, on its very face, does not comply with any one of its conditions.

Under the Revised Statutes, section 1714, a claim is to be presented by a sworn declaration, and under the regulations published in 1892, and presumed to be the same before that time, the same applies to claims for increase of pension.

The complainant made no declaration, as far as it appears, before Commissioner Tanner, and only an informal claim, in the form of a letter, before Commissioner Dudley.

The act of 1874, under which he claimed the increase to $50 per month, on account entirely of his gunshot wound, applies only to cases of *total* and *permanent helplessness*. The claimant *did not aver either fact*. He did not assert that his injuries had resulted in *total helplessness*, but confined himself to the allegation that he needed assistance in dressing his wound. And on the question of the permanency of his condition *he was entirely silent*. The examining surgeons were equally silent on both questions, and did not support his claim. The affidavits filed by him were equally silent on both points, so that he made neither the declaration nor even a show of the proofs necessary to bring him within

the act of 1874. It seems to me, therefore, at least very doubtful whether either of the Commissioners, Dudley and Tanner, had any jurisdiction to entertain his application at all. It simply presented a case which no law authorized them to act upon, and Congress was the only authority to appeal to for relief. And this is an additional reason why the present Commissioner is at liberty to disregard their action in the premises.

And this leads me to consider how far one Commisioner of Pensions may review and reverse the decision of his predecessor on a pension claim, when made within his official authority, for mistake of law or fact.

The case of the United States *v.* Bank of the Metropolis (15 Pt., 337) is cited as authority for the general proposition that the right of a public officer to review his predecessor's decisions extends no further than to errors of calculation or in cases once rejected on newly discovered material evidence.

It was a suit against the bank, as a Government depository, to recover a balance shown by the Treasury books to be on hand. The bank set off certain drafts of Reeside, a contractor with the Post-Office Department, accepted by the Postmaster-General, Amos Kendall, "*on condition that his (Reeside's) contracts be complied with*," which had been discounted by the bank. Of course, if the acceptance had been absolute, the Department would have been absolutely bound. As it was, the Government was bound by its acceptance, if the condition was fulfilled. The bank showed from Reeside's account on the books of the Department that he had complied with his contract and earned enough to meet these acceptances. These entries amounted to an admission of that fact by the Department. It was attempted to meet this by showing that certain allowances made him by Postmaster-General Barry in that account had been deemed unlawful by his successor and recharged to him; in other words, that his successor had recalled the admission made by Postmaster-General Barry, but no attempt was made to show any good reason for it.

The court said: "*There is no evidence in this cause to impeach the fairness and legality of the allowances credited by Mr. Barry; no proof that Reeside had incurred forfeiture or that advances had been made to him. Proof should have been given if it was intended to justify the recharges for the causes stated. No attempt was made to do so. The allowances, then, are credits to Reeside's account, which the defendant may use to prove his performance of the conditions of the acceptance.*"

So far there was no question about the powers of successive officers. It was only a question of proof as to Reeside's performance of his contract.

They then discuss the instructions asked for the United States, that it was the duty of the Postmaster-General to disallow credits for extra allowances which had been given by Mr. Barry, and they say: "*The successor of Mr. Barry had the same power, and no more, than his predecessor*, and the power of the former did not extend to the recall of credits and allowances made by Mr. Barry if he acted within the scope of official authority given by law to the head of a Department. *The right of an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors of calculations, and to cases of rejected claims in which material testimony is afterwards discovered and produced.*"

This is the passage which is supposed to hold by implication that, except in the cases mentioned, of errors of calculation or newly discovered evidence, the head of a Department has no right to review his predecessor's decisions. From what source it was derived I am at a

loss to understand, as it is not found in any statute or any previous decision that I have been able to discover. But what follows shows that this holding was not intended. They further say: "But, if a credit has been given, or an allowance made, as these were, by the head of a Department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allowance was made, and to settle the right between the United States and the party to whom the credit is given. *It is no longer a case between one officer's judgment and that of his successor. A third party is interested, and he can not be deprived of a payment on a credit so given, but by the interrention of a court to pass upon the right.*"

It is difficult to understand this obscure passage, unless it means that a credit once given in an account can not be recalled by either the *head of the Department who allowed it or his successor, for the latter is said to have the same power as his predecessor and no more.*

In other words, they treat it as a stated account which must be set aside by legal proceedings, to surcharge and falsify, which was claimed by defendant's counsel.

The court also thought that an act of Congress of July 2, 1836, making it the duty of the Postmaster-General to bring suit to recover money improperly allowed to contractors, by implication excluded the Postmaster-General from finally deciding himself on the propriety of such allowances.

On a fair analysis of this case I am satisfied that it can not avail as an authority for the general proposition for which it is cited. And, if it can in any sense be so used, it would only apply where the matter decided by one head of a Department is a matter of *legal right* as against the Government, and, as will be shown further on, is inapplicable in a case like the present.

There is, undoubtedly, a class of cases in which the action of an executive officer is final and can not be reviewed, either by himself or his successor in office. They will be found to be, for the most part, cases in which a transaction is closed, money paid, or a title transferred, which can not be recalled.

Such was the state of facts shown in Marbury *v.* Madison. Chief Justice Marshall said: "It is, therefore, decidedly the opinion of the court that when a commission has been signed by the President *the appointment is made, and that the commission is complete when the* seal of the United States has been affixed by the Secretary of State. * * * Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, *was appointed;* and, as the law creating the office gave the officer a right to hold for five years, independent of the Executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the law of the land."

So, in the case of United States *v.* Schurz (102 U. S., 378) it appeared that a land patent had been regularly signed, sealed, countersigned, and recorded, and yet was withheld by the Secretary of the Interior. Upon a mandamus, the court said, "Whenever this takes place the land has ceased to be the property of the Government; or, to speak in technical language, title has passed from the Government, and the power of these officers to deal with it has also passed away." In both cases the title was said to be one of record.

So, in the case of Noble *v.* Union River Logging Railroad (147 U. S., 165) it appeared that an act of Congress of March 3, 1875 (18 Stat., 482), granted a right of way to railroads through the public lands, upon their compliance with certain conditions, the principal one of

which was that a map in each case, showing the termini of the road, its length, and its route through the public lands, should be approved by the Secretary of the Interior in writing and ordered to be filed; that the defendant in error in this case had obtained the approval of its map and other papers by Secretary Vilas, and they were, in compliance with his order, duly filed. His successor, Secretary Noble, undertook to revoke this order, whereupon the railroad company obtained a final decree of injunction from this court, which, on appeal, was affirmed by the Supreme Court holding that, by virtue of the act of Congress, upon the Secretary's approval, the railroad company became vested with a right of property in the land—a right of way—and that Secretary Noble's revocation of his predecessor's approval was an attempt to deprive it of its property. The approval of the map, etc., by the Secretary was deemed to have the same effect as a patent.

In all these cases the action of the executive officers is final, because a legal title is passed from the United States and the subject-matter is no longer in the control of those officers.

There is no statute which excludes the right of an executive officer to review the action of his predecessor on any unsettled or inchoate matter not partaking of the character of those before mentioned; nor is there any decision of the Supreme Court or circuit courts of the United States establishing any such general and broad doctrine.

All that we have on the subject is the usage, or what may be called the common law, of the Executive Departments. And there is little authority to be found in relation to it, except in the Opinions of the Attorneys-General and a few of the opinions of the Court of Claims.

On October 1, 1825, we find a letter from Attorney-General Wirt to the Secretary of the Navy in relation to claims of certain persons to commissions, in which he says: "The preliminary question is how far the present Executive is authorized to review and unsettle the acts of his predecessors. * * * *Hence I have understood it to be a rule* of action prescribed *to itself by each Administration to consider the acts of its predecessors conclusive as far as the Executive is concerned.*"

On the 21st of June, 1861, twenty years after the decision in United States *v.* Bank of the Metropolis, in an opinion addressed to the Secretary of the Interior in reference to an application to reopen a rejected application for a land patent, Attorney-General Bates said: "I know of no statute which prohibits the head of a Department from examining and allowing a claim which had been before rejected by his predecessor, even where no new evidence is introduced; and, without a statutory prohibition, I presume he would have the power to do so. I do not think the decision of the head of a Department upon a claim before him has, upon the rights of a claimant, the final and irrevocable effect of the judgment of a court of justice."

Attorney-General Akerman, in an opinion to the Secretary of the Interior, March 7, 1871, thirty years after the decision in the United States *v.* Bank of the Metropolis, says: "*It has not been settled how far the decisions of the head of a Department have the conclusive effect of a judicial decision.* But the better opinion is that such decision should not be disturbed except in extraordinary cases."

Mr. Wirt gives, then, the origin of the doctrine of *stare decisis* as applied to the rulings of the head of a Department. It is simply a rule *which each Administration prescribed to itself*, without being constrained to do it by any statute or general principle of law, but simply as a matter of policy and convenience.

The only law on the subject is the usage of the Departments, which

the courts will respect and not lightly disregard, as some of the cases say, and the actual usage is the extent to which the law can be asserted. Now, this common law of the Departments is not uniform or well defined.

The majority of cases to which the rule of *stare decisis* has been applied have been applications to one officer to reconsider rejected claims against the Government which have been acted upon by his predecessor. There the Attorneys-General, with some, but not entire unanimity (*see* Bates' opinion), have advised that the decisions ought to be considered *res adjudicata*.

Again, where by statute a claim or controversy is expressly referred to an officer for an award, his decision has been held final.

So, where a controversy between parties claiming adversely to each other, the right to a land patent, an adjudication of the Land Office has been held final.

So, where land was granted by the United States by an act of Congress to a State, and the limits of the grant were decided upon by one head of a Department, and a review of that would have involved a great disturbance of interests resting upon that decision, it was held final.

This is about the extent to which I find that the opinions of the Attorneys-General go on this question, and the opinions of the Court of Claims go no further.

But, where money is payable out of the Treasury, I find nothing in these authorities which denies the right of any officer to correct an error of his predecessor made against the Government, as long as the money is still within its control. Especially must this right exist where the money is not payable as a debt, but as a bounty, and where the error is in the ascertainment of the amount and the construction of the law authorizing its payment.

The utmost that could be claimed for the case of United States *v.* Bank of the Metropolis would be that where a *legal claim* of an individual against the United States had been once decided, it could not be withheld.

But where the interpretation of the law relates to the spontaneous gift of the Government, there is no conceivable reason why any ruling of any officer should be considered unreversible.

An apt illustration is supplied by the case of a public officer, the rate of whose compensation is in question. He has no right, as against the United States, to be employed at any rate of compensation. One Secretary puts a certain construction upon the law as to his pay; a succeeding Secretary adopts a different construction, which reduces his pay for the future. Is there anything which prevents this kind of review of a predecessor's decision? These very questions arose in the case of United States *v.* Macdaniel (7 Pet., 1). The Supreme Court said, "*It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of his Department.*" And no case could better illustrate the propriety and justice of the rule than the one now under consideration.

The defendant having acted as agent for Navy disbursements for a great number of years, under different Secretaries, and having uniformly received 1 per cent on the sums paid as his compensation, he continues to discharge the duties and receive the compensation until a new head of the Department gives a different construction of the act of 1804, by which these duties are transferred to the commander of the navy-yard. By this new construction, whether right or wrong, no harm is done to the defendant, provided he shall be paid for services rendered under the former construction of the same act. It was not suggested

even that the first construction was a final determination that could not be reviewed by a succeeding Secretary.

The case of a pension would seem more analogous to this than other cases that have been alluded to.

When an applicant's name is placed on the pension rolls he does not thereby acquire a vested right to his pension as against the United States.

As the Supreme Court says in United States *v.* Teller (107 U. S., 64), "no pensioner has a vested legal right to his pension. Pensions are the bounties of the Government which Congress has the right to give, withhold, distribute, or recall at its discretion."

No title passes by the admission of an applicant to the pension roll, as in case of a patent to land, which can not be recalled. It is the duty of the officers of the Government to see that its bounty is not abused. It is the duty of the Commissioner, on a proper application, to decide what share of that bounty the law intends to bestow on the applicant. Whatever is paid to him under that decision is gone beyond recall. But if a succeeding Commissioner should be satisfied that the pensioner was wrongfully rated, why should not he correct the error as to future payments? The pensioner has no contract rights to future payments; he has no vested right in an erroneous construction of the law. The Government can not bring a suit to set aside a mere erroneous decision of an ex-officer as it can to set aside a land patent. Its only remedy is in its own hands, and that is to stop the abuse, and the Commissioner for the time being is its organ to do that.

I am referred to a digest of pension laws and decisions made in 1885, in which, on page 453, several decisions of the Secretaries are referred to as holding that the Secretary of the Interior should review the decisions of his predecessors only to the extent of correcting errors in matters of calculation and considering new and important evidence, and generally that the decisions of one Secretary are binding on his successors.

It does not appear what the facts were in these cases, but I observe the very opinions of the Attorneys-General, which I have already referred to, are cited, which are inapplicable to a case like the present.

But on another page of the same book, page 399, I find the following, viz:

"*Where an error of judgment has been made and a higher rate of pension allowed than that to which the claimant is entitled, the pension should be reduced to its proper rate upon discovery of the error;*" and again, "*rates of pension granted under the general law may be reduced or increased to conform to the degree of pensionable disability which may be found to exist upon medical examinations, which, at any time, may be ordered by the Commissioner of Pensions. * * * A vested right in and to the particular sum allowed and paid under a pension certificate does not exist.*"

A similar view was taken by the Court of Claims in the case of Harrison *v.* United States (20 C. Cls. R., 122), which was a suit to recover a pension which had once been allowed but discontinued because its allowance had been obtained through fraud. After referring to the statute the court says: "Aside from these statutes the power of revision, as the Government counsel have argued, may well be considered to be inherent in the nature of the first decision as well as in the necessities of the Bureau. The pension is a gratuity. It involves no claim of right, no agreement of parties, and as it is not assignable no acquired rights of third parties."

"The law describes a class of persons upon whom it chooses to bestow its bounty. The Secretary and the Commissioner are directed to find out and make a list of the persons thus described. The proceedings and evidence are largely *ex parte*. From the vast number of applicants the work must be performed and the roll made up for the most part by the clerks. If placing the name of an applicant upon the roll is to be considered a judicial act, should it not be considered only a judgment *nisi?*"

From the materials before me, the printed Digest of Decisions, opinions in special cases not in print, and the discussion of counsel, I infer that it has been the usage of the Department of the Interior not to apply the doctrine of *res adjudicata* to the rating of a pensioner. And in the absence of statutory provisions I should consider this usage the controlling authority on the subject. I think, however, that it has also the support of the statute law, as will be presently seen.

There was a case before the supreme court of this District, that of Hoeveler *v.* Tighe's application for the reissue of letters patent, in which it was held that where one Commissioner of Patents had decided in favor of an applicant for a patent, his successor could not review and reverse his decision. This was done entirely on the authority of the case of United States *v.* Bank of the Metropolis, and the opinions of the Attorneys-General, and the decisions of the Court of Claims, which I have already referred to. But that case is distinguishable from the present. A patent does not transfer any property from the United States. It simply creates an exclusive privilege in one person to the exclusion of his fellow-citizens. If it is obtained by fraud, the United States, in the interest of the public, may institute a suit to cancel it. It is not conclusive evidence against other inventors. But a payment of a pension does pass away the money of the United States beyond recall, and if it is wrongfully claimed, the remedy is only to reverse the ruling by which it is appropriated to the wrong party.

It has been claimed that since section 4739, Revised Statutes, confers an *express* authority to strike from the rolls the name of any pensioner when it appears by proof that it was there *through fraudulent representations*, therefore, according to the rule "*expressio unius*," etc., this excludes the authority to do it on any other ground. But when we look at the section we find that it was not intended to confer an authority but to impose a duty. It says that the Secretary "*shall* cause to be stricken from the pension roll," etc. This is not inconsistent, even by implication, with the *power* to do so in other cases.

On the other hand, we have an act which seems either to confer anew, or to recognize as already existing, the power to reexamine pensioners and reduce the pension.

The act of June 21, 1878, chapter 34, section 3, repeals sections 4771, 4772, and 4773 of the Revised Statutes, "*Provided*, That the Commissioner of Pensions shall have the same power as heretofore to order special examinations, whenever in his judgment the same may be necessary, *and to increase or reduce the pension according to right and justice.*"

It is admitted that no *express* power to reduce had been conferred before by statute. Hence, it is not unreasonable to construe this act as reserving to the Commissioner the same power he had before as to special examinations, and conferring, in addition thereto, the power to increase and reduce. But the result will be the same if we treat it as merely recognizing the power as one already existing, either by force of usage or as necessarily resulting from the power of making frequent examinations.

It has been contended, if I understand the argument, that, under the repealed sections of the Revised Statutes, the Commissioner only had the power of making special examinations in cases of varying disability, and not in such cases as the loss of a limb or *when a disability is certified by competent examining surgeons to have become permanent in a degree equal to the whole rate of pension;* and that the power referred to in the act of 1879, and by that act continued in the Commissioner, is to be confined to such cases.

Whether this is a correct view or not is not material in this case, because the complainant's injury, for which he was allowed the $50 rate, as we have seen, never was certified to be permanent by any surgeon, and therefore he remained within the class whose pensions may be *increased or reduced according to right and justice.*

Finally, we have the act of December 21, 1893, enacting that a pension shall be deemed and held to be a vested right *to that extent* that the payment thereof shall not be withheld or suspended until, after due notice to the grantee of not less than thirty days, the Commissioner of Pensions, after hearing all the evidence, shall *annul, vacate, modify, or set aside the decision upon which such pension was granted.*

This is a distinct recognition of the power of reviewing a previous decision. It is not a power of reducing or increasing *according to a changed condition of facts, but of annulling, vacating, and setting aside the original decision,* which is only done for error or else for fraud in obtaining it. It is sufficient for the purpose of this inquiry that the power of review is recognized. The construction of the act, as to the grounds of his proceeding and the evidence to be considered, is for the Commissioner.

One further consideration on the question of the Commissioner's power to review.

It is admitted in all the authorities relied on by the complainant that the right of review exists where new and material facts are brought to the attention of the Commissioner. That ground seems to be supplied in the present case. It appears that the complainant is a judge of the supreme court of Michigan. It does not appear from the papers that the fact was known to Commissioner Tanner, and it did not exist at the time of the rerating by Commissioner Dudley. But it has come to the knowledge of the present Commissioner, and it is admitted by the complainant, but he insists that it is immaterial. So, indeed, it would be on the mere question of capacity to perform manual labor; but on the issue of *total helplessness* it is very material, and in my judgment would itself justify a new examination by the Commissioner.

In my judgment, then, the present Commissioner has the authority to review the rulings of his predecessor as to the proper rating of the complainant as a pensioner.

The question whether this court can interfere with him is disposed of in the case of United States *ex rel.* Dunlap *v.* Black (128 U. S. R., 40), before referred to. In that case the interference was sought by mandamus. The court says, after citing causes: "The principal of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose. * * * The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator. * * * We have no appellate power over the Commissioner, and no right to

review his decisions." These views were reaffirmed in United States *ex rel.* Miller *v.* Raum (135 U. S. R., 200).

It is hardly necessary to say that if we have no power to compel the Commissioner to adhere to a given construction of the law we have no power to enjoin him from adopting a different one.

Some reliance has been placed upon the proceedings in mandamus as amounting to a *res judicata*. It is not the opinion of a court which has this effect, but the final judgment announced by it. There was a rule to show cause why a mandamus should not issue, but pending the hearing upon it the occasion for such a remedy was removed, and judgment was only rendered for costs, but no mandamus was issued; consequently no judgment for the relief prayed for was rendered, which alone could have constituted a *res judicata*. There was, it is true, an opinion pronounced by Justice Bradley on the original application which was thus superseded. While I have the highest respect for the opinion of my associate, I think the merits of the case have been more fully presented in the present proceeding than in the former, and I judge from Judge Bradley's opinion that some of its important features were not brought to his attention, which have partly influenced me in reaching a different conclusion from his.

The conclusion is that the Commissioner can not be enjoined, as prayed in the bill, from in any way reducing or attempting to reduce, or from modifying or disturbing the pension of the complainant, or his right to the regular and prompt payment of the same under his pension certificate of August 18, 1889.

But the act of December 21, 1893, declares that a pension shall be deemed and held to be a vested right to the extent that payment thereof shall not be withheld or suspended until, *after due notice to the grantee of not less than thirty days*, the Commissioner of Pensions, after hearing all the evidence, shall decide to annul, etc. The language as to "a vested right" has no significance. The whole act amounts to nothing but a prohibition to suspend or withhold the pension without giving at least thirty days' notice of a hearing, followed by a decision upon all the evidence.

It is admitted that such notice was not given in the present case. The law is mandatory in this respect, but leaves nothing to discretion. Hence, if the complainant insists upon it, he is entitled to an injunction against further proceedings by the Commissioner under the notice that was actually served, although not to the relief which he asks, based upon the merits of his claim to the existing pension.

WALTER S. COX, *J.*

[Filed February 28, 1894.]

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